No. 2705

In the United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT

THOMAS R. SHERIDAN,
Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA
Defendant in Error.

In Error to the District Court of the United States for the District of Oregon

BRIEF OF PLAINTIFF IN ERROR

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STATEMENT OF THE CASE

On February 21st, 1914, an indictment containing eight counts was returned in the United States District Court at Portland, Oregon, charging the defendant, Thomas R. Sheridan, with a violation of Section 5209 of the Revised Statutes of the United States.

The first count charged:

"That Thomas R. Sheridan, the above named defendant, heretofore, to-wit, on the 7th day of March, 1911, in the County of Douglas, within the State and District of Oregon, and within the jurisdiction of this Court, was then and there President of a certain National Banking Association, to-wit: The First National Bank of Roseburg, Oregon, theretofore duly organized and established and then and there existing and doing business at the City of Roseburg, in the County of Douglas, within the state and district aforesaid, under the laws of the United States, and that he, the said Thomas R. Sheridan, so then and there on the date last above mentioned being such president, did then and there at the said City of Roseburg, County of Douglas, in the State and District of Oregon, on to-wit: the 7th day of March, A. D., 1911, wilfully and unlawfully abstract and convert and cause to be abstracted and converted to his, the said Thomas R. Sheridan's own use, benefit and advantage, and to the use, benefit and advantage of one B. C. Agee, certain moneys, funds and credits of said National Banking Association, of the amount and value of Two Hundred and Thirty ($230) Dollars, a more particular description of which is to this grand jury unknown, from and out of the moneys, funds and credits of said National Banking Association, held by said National Banking Association as a deposit for the sole use and benefit of one David Hull, a depositor and creditor of said The First National Bank of Roseburg, by means of a certain instru-

ment designated as a memorandum check, without the knowledge and consent of said National Banking Association, and with the intent then and there on the part of him, the said Thomas R. Sheridan, to injure and defraud the said National Banking Association and said depositor and creditor therein;

"Contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America."

The fourth count charged:

"That Thomas R. Sheridan, the above named defendant, heretofore, to-wit: On the 15th day of April, 1911, in the County of Douglas, within the State and District of Oregon and within the jurisdiction of this Court, was then and there president of a certain National Banking Association, to-wit: The First National Bank of Roseburg, Oregon, theretofore duly organized and established and then and there existing and doing business at the City of Roseburg, in the County of Douglas, within the state and district aforesaid, under the laws of the United States, and that he, the said Thomas R. Sheridan, so then and there on the date last above mentioned, being such president, did then and there at the said City of Roseburg, County of Douglas, in the State and District of Oregon, on to-wit: the 15th day of April, 1911, willfully and unlawfully abstract and convert and cause to be abstracted and converted to his, the said Thomas R. Sheridan's own use, benefit and advantage, certain moneys, funds and credits of

said National Banking Association, of the amount and value of Five Thousand ($5,000) Dollars, a more particular description of which is to this grand jury unknown, from and out of the moneys, funds and credits of said National Banking Association, held by said National Banking Association as a deposit for the sole use and benefit of one Laura M. Verrell, a depositor and creditor of said The First National Bank of Roseburg, by means of a certain instrument designated as a memorandum check, without the knowledge and consent of said National Banking Association, and with the intent then and there on the part of him, the said Thomas R. Sheridan, to injure and defraud the said National Banking Association and said depositor and creditor therein;

"Contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America."

As stated by the Court below in charging the jury, the remaining six counts "are in all respects similar to the first, except as to the date of the abstraction, the amount abstracted, the name of the depositor and the person to whose use, benefit and advantage the moneys were appropriated."

The defendant interposed a demurrer to the indictment, specifying reasons why the indictment did not state an offense against the United States. The Court below overruled the demurrer, to which ruling the defendant excepted.

The cause came on for trial on March 23rd, 1915.

The evidence showed that the defendant had been President of The First National Bank of Roseburg, Oregon, since 1891. The uncontroverted testimony of the Cashier of the Bank, a witness for the Government, was that:

> "In the years 1910 and 1911 the directors of the bank were Thomas R. Sheridan, J. C. Sheridan, myself, Warren Reed, Morris Weber; Thomas R. Sheridan is the defendant in this case and J. C. Sheridan was a brother. It was the duty of J. C. Sheridan to write up pass books, post the general ledger and take charge of them. My duties as cashier was to keep the books, reconcile statements, clerical duties and to look after the accounts and books. Warren Reed was a director; he was a merchant and lived at Gardiner, which was located about 60 miles from Roseburg on the Umpqua River. Morris Weber was a director; he was a farmer. *Mr. Sheridan and myself ran the bank.* We all had our duties to perform in there. *I didn't have charge of the loans. I never assumed any authority in the loans. He made those himself.* I might have made some small loans, but no large ones. T. R. Sheridan did have charge of making the loans for the bank."

The evidence in regard to the first count of the indictment is as follows:

David Hull, who had a general checking account with The First National Bank of Roseburg, testified

that (Tr., p. 40) "I had a conversation with Mr. Sheridan (the defendant) relative to the loaning of some of my money in March, 1906. I told Mr. Sheridan, one day I met him, I had some money. I said, 'Mr. Sheridan, how about loaning out some money to a good man?' 'Am I a good man?' I said, 'Yes, sir, you are, Mr. Sheridan.' I never gave him any other authorization except that."

The Government offered in evidence a promissory note (Government's Exhibit No. 2), dated March 2, 1906, for $512.50, executed by the defendant in favor of Hull, payable on demand, with interest at six per cent, to show, as stated by the United States Attorney, that (Tr., p. 40) "what authority he (the defendant) had was limited to this $500 loan, and that he got that, but that he had no authority to loan any more."

On being recalled for cross-examination, Hull testified (Tr., p. 142) that, "I told Mr. Sheridan to use $500, certainly."

This transaction was not the basis of any charge, nor mentioned in any count of the indictment, but was, as stated by the United States Attorney, merely introductory to the evidence offered in support of the first count.

The transaction on which the first count is based was as follows:

The defendant drew a memorandum check or charge slip (Government's Exhibit No. 4), dated March 4, 1911, to the order of B. C. Agee, against the general checking account of David Hull. When Hull called at the bank to have his bank or pass book balanced, this memorandum check was given to him with the checks which he had drawn against his account and which had been paid and cancelled by the bank (Tr., p. 58). The memorandum check was also charged against Hull's account in the pass book when it was balanced, and Hull kept the pass book in his own possession (Tr. 56). The defendant testified that (Tr. p. 213) he drew this memorandum check "for the purpose of putting the money out at interest; the memorandum checks were given to the bookkeeper, passed through the regular form by him, written up, and charged to the account of the party."

The defendant also executed a promissory note (Government's Exhibit No. 6), dated March 4, 1911, for $230, payable on demand, to David Hull, purporting to have been signed B. C. Agee, by T. R. S. (Tr. p. 64).

The defendant testified that he put this note, together with another, (Tr., p. 213) "in an envelope marked David Hull, and put them in the alphabet H, in the vault of The First National Bank; I left them there and never took them out. . . . . The one (promissory note for $230, Government's Exhibit No. 6) signed B. C. Agee, by myself, went to the credit, as I see by the notation of March 3, 1911, of B. C. Agee's account."

The defendant also wrote a deposit slip (Government's Exhibit No. 7), dated March 4, 1911, for $230 in favor of B. C. Agee.

On March 4, 1911, the account of B. C. Agee was credited with $230 (Tr., pp. 66 and 67).

The unimpeached and undisputed testimony of the Cashier of The First National Bank, a witness for the Government, was that on March *7th*, 1911, three days after the credit had been entered in Agee's account, a charge was entered against David Hull's account for $230 (Tr., p. 66).

There is no evidence whatever that any checks were ever drawn against the credit entered in Agee's account, either by Agee or the defendant or anyone else. On the contrary, the evidence shows that Agee did not know until the time of the trial that the credit had been given to his account. Agee testified that the defendant was interested in and was financing the farming business of Agee, and that (Tr., p. 185) "I relied on him almost entirely to be financed; *I understand it is proven here that this money went into my account and that I was given credit for this money;* I don't know whether it was the understanding or not; he always handled the money and we attended to the ranch; he handled the money; I left that all with Mr. Sheridan."

The defendant testified as follows (Tr., p. 212): "I have known David Hull for eight or ten years;

Mr. Hull came to the bank and asked me if I could get some interest for him from his money; he said he did not want it to lie idle; I told him 'yes;' I told him I could use it and he said all right; he says, 'I don't need only a little money.' He said, 'It don't cost me much to live and I will have money from time to time that I will put in here and you can handle it for me any way you see proper.' I loaned it from time to time and as the loans were paid off I would give him credit in the book and then loan it out again."

David Hull testified as follows (Tr., p. 41): "Mr. Reames: Q. Did you ever authorize Mr. Sheridan to loan your money to Mr. B. C. Agee? A. No; I never did."

The evidence in regard to the fourth count of the indictment is as follows:

Money belonging to Mrs. Laura M. Verrell had been lent on a mortgage. On the maturity of the mortgage, the principal and interest, amounting to $4,000, were entered to the credit of her general checking account with The First National Bank of Roseburg, Oregon. The defendant, the President of The First National Bank of Roseburg, and Mrs. Verrell had a conversation (the date of which is not shown by the evidence) in which, as testified by Mrs. Verrell (Tr., p. 74) "He asked me if I wanted to loan that money that was paid in on the mortgage; he said he would get a good loan for me, and I supposed it was to be the bank would loan the money. There

was nothing said about it, that the bank was to loan the money, but he asked, not individually, but as president of the bank. . . . . Mr. Sheridan wanted to know if I wanted to loan it, and I said I didn't know, I was intending to put it into real estate, and he said I better loan it, it would bring me more, and I didn't want to give him any answer at that time, I wanted to think it over, which I did, and he wanted to know at that time if I wanted to put any more with that $4,000, and I told him I didn't know, that I would think it over, which I did and I told him that I would put some more that time, but there was nothing said of how much to put with it, how much I would put with it, because at that time I expected to see him again before this loan was made. . . . . That is all the conversation we had until he handed me the memorandum check; there was nothing said as to when the money was to be drawn from the bank or how. . . . . When he handed me the memorandum check, I never saw a memorandum check before, and I supposed that was to show the bank had loaned the money. . . . . He said my money was safe, safely invested, and I told him at that time that I didn't know as I ought to spare that much, and he said I could have it at any time by giving a short notice, so I let it go at that, and I supposed that my money was loaned by the bank. . . . I never told him to take that money and lend it to himself."

The defendant drew a memorandum check (Government's Exhibit No. 9) against Mrs.

Verrell's account, dated April 15, 1911, in the sum of $5,000 and executed a promissory note of the same date to Mrs. Verrell in the same sum, payable one year after date. Mrs. Verrell testified (Tr., p. 78), "I can't remember the date when he gave me that memorandum check; I remember I was in the bank and he handed me that check. . . . . (Tr., p. 74). This note I never had in my possession and I never saw it until I saw it before the grand jury at Roseburg, Oregon, a year ago last November."

The defendant testified that (Tr., p. 214), "In regard to the loan of Laura Verrell I have to say that before the Crouch $4,000 loan became due I wrote to Mrs. Verrell and told her that the money would soon be paid off and that if she wanted it to draw more interest, or words to that effect, that I could place it safely. My letter was dated April 6, 1911, and is Government's Exhibit No. 8. Shortly after that she came into the bank and as I remember she did not have quite enough money there, and she put in some money, and in the conversation I asked her if she wanted to lend that money out, and she said she did. . . . . I told her as soon as I was able to place it I would advise her and charge her account and put the document in the usual place, which I did. The memorandum check went through the books and I suppose it went to her in the usual course of business. It went to the bookkeeper." There is no evidence as to what was done with the promissory note, or that it was executed prior to or delivered or shown by de-

fendant to anybody prior to the time when it was shown to Mrs. Verrell before the grand jury.

The Cashier of The First National Bank testified (Tr., p. 88) that, "This is the individual depositors' book. I find an item on page 386 thereof, under date of April 15, 1911, in the account of Laura M. Verrell 'loaned by T. R. S.' The item shows that $5,000 was debited her account on that day." "The defendant admitted that this $5,000 was transferred to the account of Mr. Sheridan on the books" (Tr., p. 88).

There is no evidence that any checks were ever drawn against that $5,000 credit in the account of the defendant, or that because of or through such credit any moneys, funds or credits were ever taken or abstracted from the bank by defendant or anyone or converted to defendant's use or the use of anyone, or that at any time the bank has been short in its moneys, funds or credits on hand. Neither is there any evidence that any deposit slip or other instrument was used which enabled or caused anyone to enter the credit in the account of the defendant, nor that the defendant entered the credit or caused it to be entered, nor by whom the credit was entered.

The transactions charged in the remaining six counts of the indictment, as to which the defendant was found not guilty, are substantially identical with those charged in the first and fourth counts, and are, in substance, as follows:

At various times within the three years preced-

ing the return of the indictment the defendant had had conversations with certain depositors of the bank, who had general checking accounts, in regard to their obtaining interest on the amounts of money deposited by them. The defendant told them that it would be necessary to lend the money to third persons in order to earn interest; that a large number of requests for loans for a year or longer on good security were continually being made of the bank; that the bank wished to make only short time loans, but that if the depositors wished he would lend the amount of their accounts on long time loans, retaining part of the interest as compensation to the bank and crediting them with the remainder of the interest. As testified by Mrs. Byron, one of the depositors, (Tr., p. 186) "I was in the bank putting some money in, and Mr. Sheridan said to me, 'You have got too much money, Mrs. Byron, lying in the bank idle.' And I said, 'what will I do with it—if I loan it I lose it.' And he said, 'Leave it here and we will use it and it will make seven per cent for you and one for the bank.' I said, 'All right.' "

Some of the depositors expressed a fear that they might incur a risk if they consented to such an arrangement. The defendant told them that he would execute his own notes to them as security for all loans made to the third persons. For instance, J. E. Haney, one of the depositors, testified that (Tr., p. 107), "I had about $5,000, perhaps a little more than that, on deposit. The money had been there for two

or three months and I decided it was not doing me much good just laying there. I didn't know as I would want to use it right away and I asked Mr. Sheridan if he could loan it for me, so that I could get some interest out of it, and he said he could, and I said, 'How about—can you give a good security?' and he said, 'Any loan I make, I will O. K. it myself.' He said, 'Will that be all right?' and I said 'It will.' "

Several of the depositors testified that they agreed to the arrangement, some of them testifying that they agreed to it solely because of the promise by the defendant that the bank would guarantee all loans so made, and that they were not to be subject to any risk in connection therewith.

Other depositors testified that there had been conversations between them and the defendant in regard to his lending the amounts of their accounts to third persons so that they could obtain interest, but that they had not given the defendant authority to withdraw their accounts from the bank by means of memorandum checks.

Still other depositors testified that they had not had any conversations with defendant in regard to his lending the money deposited by them, and that they had not given them authority to draw the memorandum checks on their accounts or to lend the money deposited by them to anyone; but some of those depositors testified that they had received interest on their deposits, but did not inquire from the de-

fendant or any other officer of the bank why interest was being credited to them.

All the depositors who had the conversations with the defendant testified that they were to be subject to no risk whatever in connection with the loans to such persons; that the loans were to be solely at the risk of the bank; and in those instances where they knew that the amounts of their accounts had been lent they did not know, except in a few cases, the names of the persons to whom the loans had been made.

Some time after each of the conversations above mentioned between himself and the depositors regarding the latter's obtaining interest on the amounts of their deposits, the defendant drew a memorandum check against the account of the depositor. This check was charged against the depositor's account and was sent to the depositor with the next statement of account forwarded to him, attached to which were the checks which were the checks which had been drawn by the depositors against his account and had been paid by the bank. At or about the same time the defendant executed a promissory note to the depositor, either in his own name or in the name of a third person by himself. The third person was the person to whom the defendant had lent the amount of the promissory note. From the time of the execution of the promissory note by the defendant the depositor received interest on the amount of money he had deposited with—that is, lent to—the bank. The

defendant then wrote a deposit slip in favor of the third person for the amount of the promissory note and gave it to the proper clerk of the bank, whereby the amount of the deposit slip was entered on the books of the bank to the credit of the account of the third person. *There is no evidence that any money of the bank has ever been withdrawn from the bank by the defendant or anyone because of the credit thus given.* In the instances where defendant executed a promissory note without signing the name of a third person, the evidence merely was that the account of the defendant with the bank had been credited in an amount equal to that named in the memorandum check. There is no evidence that any check was ever drawn against that credit.

In 1911 an agreement was entered into between The First National Bank of Roseburg and the Douglas County National Bank of the same city, whereby the two banks were consolidated under the name of the Douglas County National Bank and the assets and liabilities of The First National Bank were assigned to and assumed by the Douglas County National Bank. For the purpose of executing that agreement, The First National Bank was placed in voluntary liquidation in accordance with the provisions of the statutes of the United States and a trustee appointed. In June, 1911, shortly after The First National Bank was placed in liquidation, it was examined by a National Bank Examiner. In examining the securities file of the bank, the Exam-

iner found the promissory notes above mentioned, and thereupon interviewed the defendant regarding them. The defendant told him all the circumstances attending their execution and that the depositors had in each instance authorized him to draw the memorandum checks and execute the notes—in other words, to change the accounts of the depositors from general checking deposits (that is, loans to the bank due and payable on demand), into time deposits, (that is, loans to the bank due and payable only at the expiration of a specified period), in consideration of the receipt of interest by the depositor on the amount of the deposit. The Examiner then wrote a letter to each depositor asking him if he had given the defendant authority to withdraw the amount of his account, and, if so, to sign a bank form of release attached to the letter, and return it to the Examiner. *All the depositors, including David Hull and Mrs. Verrell, signed the releases and forwarded them to the Examiner.*

The evidence introduced by the defendant tended to show—and the Government admitted—that the defendant had resided in Oregon for fifty-nine years and during all that time had had the very highest reputation in that community for truth, honesty, and integrity .

The defendant testified that all the depositors who had testified in the cause "wanted interest on their money and it was clearly understood between us that the money would have to be loaned in order

to make interest;" in other words, that the depositors' accounts would have to be changed from demand loans to the bank into time loans for the periods of the loans made to the third persons, and consequently, as the depositors thereby waived their right to have general checking accounts subject to be withdrawn at any time, the bank had a right to terminate the general checking accounts either by drawing memorandum checks against them or by making an entry on its books that the accounts had been converted into accounts which could be withdrawn only at the expiration of a specified period, or by any other method of bookkeeping which the bank should choose to adopt.

The Court instructed the jury that:

> "The principal question for your consideration will be—or at least the first question for your consideration will be: Was the defendant authorized by the depositors to withdraw these moneys? If you find from the testimony in this case that he was so authorized or if you find from the course of dealing between the defendant and the depositor that the defendant had reasonable cause to believe and on good faith did believe that he was so authorized, then he is not guity of the crime here charged. But if you are satisfied beyond a reasonable doubt that he had no authority from the depositor to withdraw the funds, and if you further find that he had no reasonable cause to believe and did not in good faith believe that he had such authority, then his abstraction of the funds was wrongful,

and the crime is complete if you find that the abstraction was made with the intent to injure or defraud either the banking association or the depositor. (Tr., p. 233). . . . . .

"If, therefore, you find from the evidence beyond a reasonable doubt that the defendant, Thomas R. Sheridan, without having previously secured the authority of the depositors so todo, or without apparent authority as I have defined that term to you, willfully abstracted the funds of the bank then held in said bank to the credit of said depositors in manner and form as alleged in the indictment, and converted said funds to his own use and benefit, the extent to injure and defraud both the bank and the said depositors may be by you presumed. Acts which involve such consequences, when knowingly and wrongfully committed, establish not only the guilty intent to injure and defraud mentioned in the statute, but they disclose moral turpitude utterly inconsistent with an innocent intent."

Among the instructions which the defendant requested the Court to give to the jury were the following:

"I ask the Court at this time to instruct the jury that sufficient evidence in law has not been introduced in this case to justify them in finding that defendant withdrew or abstracted money belonging to any of the depositors who have testified as witnesses in this case, on the ground that when a depositor deposits money in a national bank as the depositors testifying in

this case have done, the money so deposited ceases to be the money of the depositor and becomes the bank's money, and that there is merely a creditor and debtor relation between the depositor and the bank, and therefore that the money withdrawn or abstracted by the defendant was money belonging to the bank. (Tr., p. 242.) . . . . . .

"I also particularly except to the Court's refusal to instruct the jury in accordance with defendant's requested instruction No. 5, that an officer of a National Bank who has full charge of making loans on behalf of the bank, has a right to lend any portion or all of the money deposited in the bank by depositors on general checking accounts, without first obtaining permission from the depositor or depositors to do so. (Tr., p. 234.) . . . . .

"I ask the Court at this time, if the Court please, to instruct the jury that the indictment in this case charges the defendant with having abstracted moneys, funds and credits of The First National Bank of Roseburg, Oregon, and that therefore, if the jury find that the moneys, funds or credits abstracted by the defendant as shown by the evidence in this case were moneys, funds or credits of the depositors who have testified in this case, the jury should find the defendant not guilty. (Tr., pp. 242-243.) . .

"I take an exception to the refusal of the Court to instruct the jury to return a verdict for the defendant on the ground that sufficient evidence in law of intent to defraud on the part of

the defendant has not been introduced in this case, and as that is an essential element of the crimes charged that therefore the jury would not be justified in returning a verdict against the defendant on any or all of the counts in this indictment. (Tr., pp. 241-242.)

"I except to the Court's refusal to instruct the jury to return a verdict in favor of the defendant on the ground that sufficient evidence in law that defendant did not have authority to withdraw or abstract the money deposited in the bank of which he was the president, in the manner and by the method which the uncontradicted evidence in this case shows was employed by him, has not been introduced in this case." (Tr., p. 242.)

The jury returned a verdict against the defendant on counts Nos. 1 and 4 of the indictment, finding him not guilty as to the remaining counts.

After the jury had returned its verdict, the learned judge presiding, notwithstanding its verdict, said from the bench that he did not believe the evidence showed an intent to defraud on the part of the defendant.

The defendant moved in arrest of judgment, and for a new trial. The Court denied the motions, and thereupon sentenced the defendant to imprisonment for five years in the United States Penitentiary at McNeil's Island, Washington.

ARGUMENT

The Demurrer to the Indictment Should Have Been Sustained

(1) The unlawful abstraction and conversion of money which a bank holds for the sole use and benefit of a depositor is not an offense against the United States.

The first count of the indictment describes the money charged to have been abstracted and converted by defendant as "certain moneys, funds and credits of said National Banking Association, of the amount and value of Two Hundred and Thirty ($230.00) Dollars, a more particular description of which is to this grand jury unknown, from and out of the moneys, funds and credits of said National Banking Association, held by said National Banking Association as a deposit for the sole use and benefit of one David Hull, a depositor and creditor of said The First National Bank of Roseburg."

Section 5209, R. S., prohibits only abstractions of moneys which are held by the bank *as a bank* and not as a special bailee. The unlawful abstraction of moneys held by the bank as a special depositary or bailee is punishable under the laws of the State where the abstraction is committed.

Section 5209, R. S., is a re-enactment, *without*

amendment, of the Act of Congress of June 3, 1864, Sec. 55, ch. 106, 13 Stats. at L. 116. With reference to the latter statute, in *Commonwealth vs. Tenney, 97 Mass. (15 Allen) 50, 56*, in which the defendant, a clerk of a national banking association, had been convicted under the general statutes of Massachusetts of fraudulent conversion of property of individuals deposited with and in the custody of the bank, the Court said:

> "The further objection is made, that the courts of the United States are vested by the Judiciary Act of September 24, 1789 (U. S. Stats. 1789, c. 20, sec. 11), with exclusive cognizance of all crimes cognizable under the authority of the United States, except where it is otherwise provided by the acts of Congress. But an examination of the statues of the United States leads us to the conclusion that the offense charged in this indictment has not been made punishable by any act of Congress. *The enactments cited on behalf of the defendant punish the embezzlement of the property of national banks, but not the property of individuals, deposited with and in the custody of such banks.* U. S. St. 1863, c. 58, sec. 52. U. S. St. 1864, c. 106, sec. 55. As the federal courts have no criminal jurisdiction except that conferred by Congress, no question can be made as to the constitutionality of State legislation punishing such frauds, until they have been made punishable by the federal laws. There is no view of the relative, or of the concurrent, powers of the two governments which affects the decision of the present

case; for all courts and jurisdictions agree that State sovereignty remains unabridged for the punishment of all crimes committed within the limits of a State, except so far as they have been brought within the sphere of federal legislation by the penal laws of the United States. *Commonwealth vs. Fuller, 8 Met. 313; Commonwealth vs. Peters, 21 Met. 387.*"

In *State vs. Tuller, 34 Conn. 280,* the information under a Connecticut statute charged the teller of a national banking association with the "theft and embezzlement" of certain bonds in the bank, particularly described the bonds, and then set forth that the bonds were "the property and estate of Loyal Wilcox of said Hartford, the same having been by him, the said Wilcox, deposited with said bank in the banking house of said bank for safe keeping, and then and there deposited in said banking house." The Court said:

> "Congress by the National Currency Act incorporated the bank in question as a bank, located within this State. They enacted all the provisions which were necessary to constitute it a corporation and give it being, and all of power or restraint that they deemed essential to regulate that being. They authorized it in general terms to do a *banking* business, but they did not undertake, by any regulation or restraint, to regulate that business; and they left that to be regulated by the laws of the State and land. They did enact in the 55th section of the Currency Act *(which is identical with Section 5209,*

R. S.) that if any teller or other officer of the bank should embezzle the *property of the bank* they should be punishable by fine and imprisonment. That provision goes to the being and internal working of the bank, and is intended to protect its property from its agents. *It was not intended to regulate, and has not the effect of regulating, the business of the bank with its customers.* Now the business of the bank is conducted within the jurisdiction of this State, with our citizens, and in conformity to our laws, and it is competent for the legislature to pass any law affecting that business, or protect the bank and its customers in the conduct of that business by any penalty, and such law and penalty will not be predicated on any law or offense created by Congress, or have any relation or be repugnant to the Currency Act, or in any manner infringe the jurisdiction of Congress or the federal courts. . . . . As a corporation being located in the State, its property and interests and business are protected by State laws and subject to State legislation, and so it is competent for the legislature to protect its customers, the citizens of the State, in their business dealings with it, whatever they may be, whether constituting the relation of borrower and lender, or of special or general depositary and bailee; and they may be controlled and protected by penal enactments, without interference with the laws of Congress. Such is the character of the statute in question. It is in part repugnant to the law of Congress, but it also protects a special depositor of the bank against the felonious or fraudulent appropriation of the deposit by

the agents of the bank, who have access to it, and so far forth it is not open to the objections urged. . . . . .

"The second claim is also without foundation. The property is not laid in the second count as the property of the bank; but as a special deposit by a third person, differing from money deposited on general account, intended by both parties to be mingled with the assets of the bank and to become its property. These special deposits are very common, and that fact, and the language used, taken in connection with the provision in respect to the persons who may be defrauded, makes it very clear that the legislature intended to provide for just such a case."

In *Ex parte Houghton, 8 Fed. 897*, the Court, in discussing the criminal jurisdiction of State courts over officers of national banks in the absence of federal legislation, said approvingly:

"The Supreme Court of Massachusetts took jurisdiction over an embezzlement of a private special deposit in a national bank by an employee of the bank, on the ground that Congress had not provided for that particular offense. *Commonwealth vs. Tenney, 97 Mass. 50.*"

The title to the thing deposited specially is not in the bank, but remains in the depositor.

Marine Bank vs. Fulton, etc. Bank, 2 Wall. 252.

Thompson vs. Riggs, 5 Wall. 663.

Bank vs. Wister, 2 Pet. 318.

Scammon vs. Kimball, 92 U. S. 362.

State Nat. Bank vs. Dodge, 124 U. S. 333.

Phoenix Bank vs. Risley, 111 U. S. 125.

San Diego County vs. Cal. Nat. Bk., 52 Fed. 59.

A special deposit cannot be checked upon, because it does not belong to the bank.

Hodgin vs. People's Nat. Bank, 125 N. C. 503, 34 S. E. 709.

Bank vs. Armstrong, 15 N. C. 519.

(2) If the offense charged in the indictment is a misdemeanor, then, as no punishment has been provided for it by Congress, the indictment does not state an offense against the United States.

The Act of Congress of March 4, 1909, ch. 321, sec 335, 35 Stats. at L. 1080, 1152 (creating the so-called Federal Penal Code of 1910), provides that:

> "All offenses which may be punished by death, or imprisonment for a term exceeding one year, shall be deemed felonies. All other offenses shall be deemed misdemeanors."

It is a corollary of that statute that "No misdemeanor shall be punished by imprisonment for a term exceeding one year."

Since Section 5209, R. S., expressly declares that the offense charged in the indictment is a misdemeanor, a modification or repeal of the punishment will not be construed as changing the nature of the offense. The distinction between a felony and a misdemeanor is far more important than the modification or repeal of the punishment for a particular crime. The offense is distinct from the punishment provided for that offense, and either may be modified or repealed without affecting the other. For example, if the punishment for a misdemeanor is repealed by statute, and the misdemeanor is a common law misdemeanor, the punishment provided by the common law may be imposed. But the offense denounced by Section 5209, R. S., is not a common law misdemeanor or felony. Under the common law it is a mere, unpunishable, breach of trust. Therefore, since no punishment is provided by either the common law or the statute, an indictment charging the commission of the acts denounced by Section 5209, R. S., does not state an offense against the United States. Changes by implication in statutes of the nature of offenses, as distinguished from changes in the extent of punishment, are not favored. It is well-settled that no violation of the laws of the United States is a felony unless it is *expressly* declared to be so by an Act of Congress. *In re Acker, 66 Fed. 290.*

A milder new punishment—that misdemeanors shall be punished by imprisonment for not longer

than one year—should be held to repeal an older and severer punishment.

In Clark and Marshall on The Law of Crimes (2nd ed.,), page 7, it is said:

> "The chief division of crimes is into felonies and misdemeanors. The distinction is of great importance. . . . . The common law felonies were murder, manslaughter, rape, sodomy, robbery, larceny, arson, burglary, and perhaps mayhem. In this country there is no forfeiture of property on conviction of crime, but the distinction between felonies and misdemeanors is still recognized, and, as stated above, it is very important. . . . . *An offense cannot be construed as impliedly made a felony by statute, unless such an intention on the part of the legislature is clear, and the implication is a necessary one.*"

The statute of 1909 should be construed to declare as felonies only those offenses for which punishment for a term exceeding one year has been provided, *but which have not been specifically designated as misdemeanors.*

As the statute of 1909 is composed of general terms or expressions, and is inconsistent with the more specific and particular provisions in Section 5209, R. S., the provisions of Section 5209, R. S., as to the character of the offense should be given effect, as greater and more definite expressions of the legislative will, and the statute of 1909 merely be given effect to the extent of abolishing the punishment.

The offenses denounced by Section 5209, R. S., not being offenses—not even misdemeanors—at common law, the general terms of the statute of 1909 should not be so construed as to impliedly declare them to be the highest grade of offense—that is, felonies.

In *U. S. vs. Sims, 161, Fed. 1008, 1012,* the Court said:

> "The offense of which Chisholm was convicted (embezzlement of the funds of a national banking association), is, of course, not treason; neither is it under the federal statutes a felony. Section 5209, Revised Statutes. . . . . Again, comparing the facts constituting the offense described in Section 5209, Revised Statutes, with the common law rule, I am of the opinion that there is ample authority to sustain the proposition that embezzlement of this kind was at common law no offense at all, but a mere breach of trust. The following authorities sustain this statement of the law (citing cases). . . . . 'Purpose to steal' is not designated in Section 5209, but the purpose or intent therein stated is 'to injure or defraud the association, or some other company,' etc."

Furthermore, the breaches of trust denounced by the statute are peculiarly misdemeanors, as distinguished from felonies, because they relate to *DEMEANOR* and misconduct "in the business of one's office."

(3) If the offense charged in the indictment is a felony, then the indictment is defective because (a) it merely charges the acts constituting the offense in the language of the statute.

An indictment for felony must set forth the acts constituting the crime with much greater particularity than an indictment for a misdemeanor.

The decisions of the United States Supreme Court rendered prior to 1910, determining the sufficiency of the averments in indictments for misdemeanors under Section 5209, R. S., *have been overruled by the Act of Congress enacting the so-called Federal Penal Code of 1910.* The federal courts prior to 1910 determined that indictments under Section 5209 were sufficient if they charged the offense in the language of the statute, because the offense was only a misdemeanor.

In *United States vs. Mills, 7 Pet. (32 U. S.) 138*, an indictment against a letter carrier for embezzling mail entrusted to him for delivery, which was declared a misdemeanor by an Act of Congress, the Supreme Court said:

> "The general rule is that in indictments for *misdemeanors* created by statute it is sufficient to charge the offense in the words of the statute. *There is not that technical nicety required as to form, which seems to have been adopted and sanctioned by long practice in cases of felony,* and with respect to some indictments, where

particular words must be used, and no other words, however synonymous they may seem, can be substituted. But in all cases the offense must be set forth with clearness, and all necessary certainty, to apprise the accused of the crime with which he stands charged."

In *United States vs. Morse, 116 Fed. 429, 432,* referring to the contention that as a violation of Section 5209, R. S., was merely a statutory misdemeanor it was sufficient to charge the offense in the indictment in the language of the statute, the Court said:

"However unfortunate, if not unnecessary, was any departure from the plain rule that *a statutory misdemeanor is sufficiently alleged in the language of the statute,* the Britton decisions (U. S. vs. Britton, 107 U. S. 655 and 108 U. S. 192) are plain that not every misapplication is a crime under the Act, and that the test (or at least a test) of criminal misapplication is that there must be a conversion of the moneys, funds or credits of the association by the accused, either for his own use or that of some person other than the injured bank. This is more than a rule of pleading. Unless such conversion be shown in evidence there can be no conversion; but it follows from this substantive law that an indictment alleging willful misapplication must show upon its face the criminality of the transaction described and negative an innocent interpretation, if one be possible."

(3-b) If the offense charged in the indictment is a felony, the description of the property charged to have been abstracted is ambiguous and not sufficiently definite.

Property is required to be very particularly described in an indictment for a felonious taking.

The indictment charges the abstraction of "certain moneys, funds and credits." (Tr. p. 6.)

"Of the amount and value of $230" is not part of the description of the money, but is mere surplusage, and should be alleged only in cases where the statute declares that abstraction of property exceeding a certain value is a greater crime than abstraction of property of a less value. Besides it should show (1st) how much money; (2nd) how much funds, and (3rd) how much credits separately; else it is fatally defective. *(152 Fed. 542 post.)*

In *United States vs. Smith, 152 Fed 542, 544,* it was held that an indictment under Section 5209, R. S., which described the property willfully misapplied as "*funds and credits*" *was bad,* both for duplicity and for insufficient description of the property charged to have been misapplied, the Court saying:

> "The remaining five counts, however, require us to ascertain, if possible, the proper signification of the words, '*moneys, funds and credits,*' used in the statute, and this, in some respects, is without difficulty. The word 'money' is doubtless equivalent to 'currency,' and its meaning is apparent. But Congress could not have intended that the word 'funds' or the word

'credits' should be construed to mean the same thing as the word 'money,' or its equivalent, 'currency,' or that the word 'funds' should be regarded as synonymous with the word 'credits.' The three words do not mean, and evidently were not supposed to be construed as meaning, the same thing, as mere tautology was not designed. When we speak of funding an indebtedness, we understand that it is to be put into a more permanent form. In England 'the funds' are considered to be the Government's bonded indebtedness, and not its mere currency or money; and so it is also in the United States. At any rate, a careful consideration induces the court to agree with Judge Priest, in his opinion in the case of United States vs. Greve, 65 Fed. 489, that the word 'funds' has a different meaning from the word 'moneys' as used in the statute. In the opinion of the court the word refers to forms of somewhat permanent indebtedness and to a class of securities in which permanent investments are likely to be made.

"The remaining word 'credits' refers to something nearer to the bank's daily business transactions, and should be given a different meaning from that of either of its associate words. We have not found in any of the dictionaries or encyclopædias to which we have access the word 'credits' in the plural form as used in the statute, nor have we found anywhere any precise definition of it as used in Section 5209; but in many cases noted under the word in 2 Words and Phrases, p. 1728, et seq., we find it construed as used in the revenue laws of the

States, and those cases have been instructive. Certainly, as used in Section 5209, it does not mean something which is merely the opposite of the word 'debit,' commonly used in bookkeeping. But, without further enlarging upon the reasons for doing so, the court has reached the conclusion that *the word 'credits,' used in the statute, means debts due the bank, or promises to it to pay money*, namely, such as its notes and bills receivable, as distinguished from more permanent investment securities, like government or other bonds, not payable to the bank, and not evidencing an indebtedness created by its loans to customers. Stated shortly, the court is of opinion that the word 'money' refers to the currency or circulating medium of the country; that the word 'funds' refers to Government, State, county, municipal, or other bonds, and to all forms of obligation and securities in which investments may be made; and that the word 'credits' refers to notes and bills payable to the bank, and to other forms of direct promises to pay money to it. . . . . .

"The seventh count charges that the defendant willfully misapplied $2930.60 of the 'funds and credits' of the bank with the various intents denounced by the statute. . . . . The word 'money' is not mentioned in this count, and there is no description either of the 'funds' or of the 'credits' so charged to have been misapplied. If the word 'money' alone had been used, it is difficult to see how there could have been any difficulty about the question; but that word was not used at all, and if the court

has correctly ascertained or approximated the proper meaning and signification of the words 'funds' and 'credits,' then there should have been such a particular description of the 'funds' and of the 'credits' as would have enabled the accused to present his defense, and so that the judgment here would bar another prosecution. This result is manifest from the cases of *United States vs. Hess, 124 U. S. 483; Evans vs. United States, 153 U. S. 586; and Keck vs. United States, 172 U. S. 436*, and cases cited. . . . . .

"The same considerations must control in disposing of the demurrer to the eighth count of the indictment.

"The ninth count is open to similar objections, with the additional one of duplicity, as this count charges the embezzlement, as well as the willful misapplication, of 'funds and credits' of the bank, without setting forth any particular description of either, and without any express statement as to the amount either of the 'funds' or of the credits which had thus been embezzled or misapplied.

"*The tenth count is equally, if not more faulty, inasmuch as it charges the willful misapplication of 'money, funds and credits,'* without any particular description either of the funds or the credits alleged to have been misapplied, *and without showing how much there was of money and of funds and of credits separately.*"

In *United States vs. Greve, 65 Fed. 488, 489-*

490, an indictment for a violation of Section 5209, R. S., the Court said:

> "As to the second ground, the language of the statute is that 'the defendant did have and receive,' etc., 'certain of the *moneys and funds* of said National Banking Association of *the amount and value of $5,723.93*. It is a question whether this is not too indefinite, as failing to state the kind of money deposited, that is, whether moneys of the United States or of some other nation; but it is not necessary to hold thus narrowly. The charge is the embezzlement of *moneys and funds*. The words 'moneys and funds' are not of identical meaning. 'Funds' includes moneys and anything more, such as notes, bills, checks, drafts, stocks, and bonds. Now, what was intended by the phrase 'moneys and funds'? Was it intended to say 'moneys and moneys'? The natural interpretation of the phrase is 'moneys and some other species or character of funds.' The word 'funds' is not used in the alternative as a synonym. It is used in the conjunctive. Its function, as no doubt the purpose of its use was, to add something to the term 'moneys.' The charge then is in effect that defendant did have and receive, etc., moneys and other funds, etc. Now is this sufficiently definite?

In the case of *People vs. Cohen*, *8 Cal. 42*, the Court said:

> " 'There is another objection to the indictment which is fatal. It does not state what was the property converted. The language is,

"$400,000, moneys, goods and chattels." How can the defendant know what he is charged with, or how prepare for his defense? How much money, what goods, and what chattels?'

"*As in the case at bar only money was embezzled, the indictment should charge the embezzlement of money only. If money and other funds were embezzled, the amount and value of the several species of property should be stated.* The words 'and funds' cannot be rejected as surplusage, for the amount and value stated in the indictment applies to moneys and funds jointly, and rejecting either there is no suggestion in the indictment as to the amount or value of the other."

The force of this objection becomes all the more apparent when we consider the only allegation as to how the abstraction was accomplished, viz: "by means of a memorandum check." How could "credits" or "funds" be obtained or abstracted or converted by use of a memorandum check? The indictment is a skeleton as bare as the statute, and forces the defendant to trial with no information sufficient to formulate a defense.

(3-c) **If the offense charged in the indictment is a felony, the indictment is defective because the acts constituting the fraud, or from which an intent to defraud may be inferred, are not stated in it.**

Fraud, being a conclusion of law, or at least a mixed conclusion of law and fact, it is necessary, in

both bills in equity and in indictments, to state the particulars of the fraud, showing that an undue or unconscionable advantage has been taken of another and that the latter has been injured.

All that is charged in the indictment is that the defendant "abstracted and converted to his own use and benefit . . . *by means of a memorandum check.*" How the check was procured, by whom signed, from whom obtained, how used, what method employed—is nowhere alleged.

In *United States vs. Corbett, 162 Fed. 687*, an indictment for having made false entries in a report of a national bank in violation of Section 5209, R. S., the Court said:

> "The indictment also charges that the entries were made with the intent to injure and defraud the bank itself; but how this could be does not appear. It is barely possible that some harm might indirectly have come to the bank by the publication of the false report in the vicinity of the place where the bank was located, but this possibility is not sufficient to show the definite intent shown by the statute. The report must have been made with the purpose on the part of those signing it to injure and defraud the bank. The report could not possibly change the actual condition of the bank, and a false report showing a better condition than in fact existed might as readily be a benefit to the bank as a detriment. At all events the detriment would be merely speculative, insufficient

to afford proof of a positive intent to injure and defraud the bank."

In *United States vs. Watkins, 3 Cranch, C. C., (U. S.), 441,* the Court said:

> "Fraud is an inference of law from certain facts. A fraud therefore is not sufficiently set forth in an indictment unless all the facts are averred which in law constitute the fraud. Whether an action be done fraudulently or not is a conclusion of law so far as the moral character of the act is involved. To aver that the act is fraudulently done is therefore, so far as the guilt or the innocence of the act is concerned, to aver a matter of law and not a matter of fact. *An averment that the act was done with intent to commit a fraud is equivalent to an averment that the act was done fraudulently.* No epithets, no averment of fraudulent intent, can supply the place of an averment of the fact or facts from which the legal conclusion of fraud is to be drawn."

Such words as fraud, conspiracy with intent to defraud, and words of similar import cannot be used as predicating criminality of facts which in themselves show no criminality.

Ambler vs. Choteau, 107 U. S. 586;

United States vs. Des Moines Co., 142 U. S. 544;

United States vs. Eno, 56 Fed. 220.

In *United States vs. Hess, 124 U. S. 483, 484,* the Court said:

"The doctrine invoked by the Solicitor General, that it is sufficient in an indictment upon a statute, to set forth the offense in the words of the statute, does not meet the difficulty here. Undoubtedly the language of the statute may be used in the general description of an offense, *but it must be accompanied with such a statement of the facts and circumstances* as will inform the accused of the specific offense, coming under the general description, with which he is charged. . . . . In *United States vs. Cruikshank, 92 U. S. 542* . . . . the Court said (p. 558): "It is an elementary principle of criminal pleading, that where the definition of an offense, whether it be at common law or by statute, includes generic terms, it is not sufficient that the indictment shall charge the offense in the same generic terms as in the definition; but it must state the species; it must *descend to particulars*. 1 Arch. Cr. Pr. and Pl. 291. The essential requirements, indeed all the particulars constituting the offense of devising a scheme to defraud are wanting. Such particulars are matters of substance and not of form, and their omission is not aided or cured by the verdict."

(3-d) If the offense charged in the indictment is a felony, the indictment is defective because it does not charge that there has been a violation of a right of either the bank or any depositor.

The abstraction of money of the depositor as charged in the indictment to defendant's own use would be lawful if made with the consent of or au-

thority from the depositor, but the indictment does not allege that the defendant did not have such authority, or that the depositors did not give such consent. It merely alleges that the abstraction was without the knowledge and consent of the *bank*.

(3-e) **If the offense charged in the indictment is a felony, the indictment is defective because the charge in the language of the statute that the defendant "unlawfully abstracted and converted" certain property is too indefinite and uncertain to inform the defendant of the specific criminal acts with which he must be charged.**

The mere allegation that the abstraction was "by means of a memorandum check" leaves us wholly uninformed as to the method by which it was accomplished. Whose memorandum check? By whom signed? On what deposit drawn and by whom? How was the money on credit or fund obtained by a "memorandum check?" What "credit" was abstracted and by whose check, and how obtained or used?

That moneys have been "unlawfully abstracted and converted" is merely the language of the statute and is a conclusion of law arising from criminal acts. The indictment should allege the specific criminal acts, showing *how the abstraction and conversion were effected*, and that the "abstraction and conversion" resulted therefrom.

In *United States vs. Smith, 152 Fed. 542, 544,* the Court said:

> "The mere conclusion of the pleader that the defendant misapplied the credits of the bank is not sufficient. The willful misapplication must appear *from acts alleged to have been done.* No such acts are charged, unless by recital somewhat in the language of the statute."

In cases of this nature nothing must be left to inference or implication. All must be distinctly and particularly alleged.

United States vs. Martindale 146 Fed. 280-284.

(3-f) The charge in the indictment that the money was abstracted "by means of a certain instrument designated as a memorandum check" is unintelligible and uncertain and repugnant to the other charges in the indictment.

It is impossible to "abstract" money from a bank by means of a check. On presentation of a check to a bank the money is "abstracted" by the teller of the bank to whom the check is presented, and then "given" by the teller to the person presenting the check. In such a case, if the check should not have been paid, the person presenting it might be guilty of obtaining money under false pretenses, but certainly he has not "abstracted" any money from the bank. *If the teller "abstracts" the money and unlawfully converts it to his own use, and places a memorandum check in his files, the memorandum check is not the means by which the money has been abstracted, but, if anything, is merely a means used to conceal the*

fact that an "abstraction" has already been made. Therefore the indictment shows on its face that the "abstraction" charged could not possibly have been committed.

The indictment is barren of all information as to the character of the "memorandum check" and the means by which it was utilized to accomplish the abstraction.

The description of the memorandum check should at least give the names of the parties to it, and the date when it was drawn.

The indictment does not allege:

(a) That the memorandum check was drawn on the national banking association mentioned in the indictment;

(b) That the memorandum check was not signed by the depositor or by the defendant with the authority of the depositor;

(c) That the memorandum check was not as valuable as the money withdrawn by means of it;

(d) That the memorandum check was presented to the bank for payment, or that it was paid by the bank;

(e) That a false credit was secured by the defendant with the bank by depositing the memorandum check, or how it was possible for the defendant

by means of the check to abstract the moneys of the bank;

(f) That the check was drawn in favor of the defendant; or

(g) That the check was drawn by the defendant.

(4) *The grand jury intended to charge the defendant only with having committed a misdemeanor, and not a felony.*

The indictment charges that the abstraction was made "unlawfully" instead of "feloniously." This clearly shows that the grand jury intended to charge a misdemeanor, because the proper adjective to use with reference to acts which are a misdemeanor is "unlawfully," but with reference to acts constituting a felony the word "feloniously" must be used.

Therefore if the defendant be regarded as having been convicted of a felony, he was convicted of an offense of which the grand jury did not intend to indict him. There is only a difference in degree between the case at bar and an instance where a grand jury, intending to indict a man for a disturbance of the peace, finds an indictment on which the man is convicted of murder.

In *Halsbury's "The Laws of England," vol. 9, p. 341,* it is said:

"Every indictment for a felony must aver that the alleged act or acts was or were done *feloniously*, and if the word 'feloniously' is omitted in the indictment the indictment, it seems, is bad (citing cases), and every indictment for a misdemeanor must aver that the alleged act or acts was or were done 'unlawfully.' An indictment for a misdemeanor which contains the word 'feloniously' is, it seems, bad."

In *United States vs. Greve, 65 Fed. 488, 489*, an indictment for a violation of Section 5209, R. S., the Court said:

> "Embezzlement, in its technical sense, and with respect to such punishment as the statute under consideration (Section 5209, R. S.) prescribes, most usually means a felonious appropriation by a servant of his master's property while it is in his keeping; and 'feloniously' means with a deliberate intent to do a wrongful act. It is true, the indictment here charges that the embezzlement was done with 'the intent then and there to injure,' etc., but *this does not express precisely the same meaning as 'feloniously,'* because in the latter the element of deliberation is embraced. There would be no tautology in using both expressions."

(5) The indictment is defective because it does not state that the abstraction was made "without the knowledge and consent of the board of directors of the First National Bank of Roseburg."

The charge contained in each count of the indictment that the abstraction and conversion were "without the knowledge and consent of said national banking association" is indefinite, uncertain, and unintelligible.

In *United States vs. Martindale, 146 Fed. 280, 283, 284*, an indictment of the president of a national bank for a violation of the provisions of Section 5209, R. S., the Court said:

> "Be this as it may, there is a fatal objection to this count in that it does not allege that the transaction in question out of which the draft was issued, was without the knowledge and approval of the *board of directors*, or the discount committee of the bank. The allegation of the indictment is that it was a misapplication 'of the moneys, funds, and credits of said association, without the knowledge and consent thereof.' . . . . It has been the understanding of the law of pleading in such indictments ever since the ruling of the Supreme Court in United States vs. Britton, 108 U. S. 193-197, that it must be alleged that the note, placed in the bank as the basis of the fund drawn out by the check or draft should have been discounted or received without the knowledge or approval of the board of directors or governing discount committee. In United States vs. Britton, 108 U. S. 193-197, the Court said: 'This count does not charge that the note of the defendant was discounted at his instance, without the authority of the board of directors. . . . .

"The pleader in this case recognized the obligation, in drawing the indictment, to charge that the transaction had 'passed muster' without the proper authority, and he therefore alleged that it was done without the knowledge of the association. The term 'association' is generic. It may comprehend the whole body of men, like the stockholders, who unite in forming the body politic of a banking institution; in which sense the allegation of the indictment might be true when the board of directors or the governing committee had not passed upon the transaction. As it is recognized usage and fact that the daily discounts and transactions of this character in a national bank are conducted by and through discount committees, *the indictment*, as applied to the instance of this count, *should negative the knowledge and approval of the recognized body for passing on such transactions. In criminal proceedings the rule strictissimi juris obtains. Nothing can be left to inference or implication.* . . . . This proposition evidently was present to the mind of Judge Taft in his charge in United States vs. Youtsey, 91 Fed. 868, 869."

In *United States vs. Youtsey, 91 Fed. 864, 870*, Circuit Judge Taft, charging the jury in a case in which the defendant had been indicted for a violation of Section 5209, R. S., said:

"The principle on which rests the requirement that the Government shall show that there was no consent by the board of directors to the defendant's acts before conviction is that one

> cannot steal what is given him, and cannot embezzle that which his principal consents that he may take. The question here really is, did the bank consent, *by its governing board or its exchange committee*, to the acts of Youtsey which are charged to be criminal, before they were done, or at the time? If so, then he cannot be held on these charges."

(6) The indictment does not allege in manner sufficient in law:

(a) That The First National Bank of Roseburg was a national banking association organized under the laws of the United States;

(b) That the bank was doing business at the City of Roseburg, Oregon, at the time of the offense charged; or

(c) That the bank was situated in the District over which the Court had jurisdiction.

The language of the indictment, "theretofore duly organized and established and then and there existing and doing business at the City of Roseburg, in the County of Douglas, within the State and District aforesaid, under the laws of the United States," *is a mere recital and not an allegation of fact.* It is one of the most ancient and well-settled principles of pleading that an indictment must state positively and affirmatively, and not by way of a mere participial phrase or recital or by implication, all the essential

elements necessary to constitute the offense charged. *2 Hawk., P. C., c 25, s. 60; R. vs. Whitehead, 1 Salk. 371; R. vs. Cowhurst, 2 Ld. Raym. 363; R. vs. Goddard, 3 Salk. 171.*

In *United States vs. Hess, 124 U. S. 483, 484,* the Court said:

> "The statute upon which the indictment is founded only describes the general nature of the offense prohibited; and the indictment in repeating its language, without averments disclosing the particulars of the alleged offense, states no matters upon which issue could be joined for submission to a jury. The general, and with very few exceptions of which the present is not one, the universal rule on this subject, is, that all the material facts and circumstances embraced in the definition of the offense must be stated or the indictment will be defective. No essential element of the crime can be omitted without destroying the whole pleading. The omission cannot be supplied by intendment or implication, and the charge must be made directly and not inferentially, *or by way of recital.*"

In *Axtell vs. State, 173 Ind. 711,* an indictment for embezzlement of funds of a building and loan association under an Indiana statute, the Court said:

> "The first count, omitting formal parts, is as follows: 'That Harry A. Axtell, late of said county, on September 14, 1907, at said county and State aforesaid, *being then and there an*

officer, agent and employee of the real estate, building and loan fund association of Bloomington, Indiana, *which said real estate, building and loan association was then and there an association theretofore organized under the laws of the State of Indiana, which said association was then and there carrying on the business of receiving on deposit moneys and loaning the same*, and receiving moneys in payment of said loans at the city of Bloomington in said county and State, said Harry A. Axtell, then and there had access to, control and possession of a certain sum of money, to-wit, the sum of $700, of the value of $700; said Harry A. Axtell then and there had access to, control and possession of said sum of money by virtue of and because of his then and there being an officer, agent, and employee of said real estate, building and loan fund association as aforesaid to the possession and ownership of which said real estate, building and loan fund association was then and there lawfully entitled, and said Harry A. Axtell did then and there unlawfully, feloniously, willfully and fraudulently take, purloin, secrete, and appropriate to his own use said sum of money aforesaid, contrary,' etc. . . . .

"Appellant insists that this count fails to charge a public offense, for two reasons: (1) because it contains no direct averment of a confidential relation between appellant and the loan association, and (2) because it contains no averment that appellant, at the time of the alleged wrongful act, was entrusted by the loan association with the money he is alleged to have

embezzled. The consideration of these points naturally blends, and they will, therefore, be considered together.

"To start with, it should be borne in mind that the basic difference between the crime of larceny and that of embezzlement is that the former is predicated upon the wrongful taking of property with intent upon its conversion, and the latter upon a wrongful conversion of property rightfully in possession. The former may take place among strangers, while the latter can only be consummated in cases where, by virtue of a special confidential relation, the defendant has been entrusted with access and possession. Larceny and embezzlement chiefly differ in the manner of obtaining possession, and to enable the court to distinguish the particular offense proved, and to test the legal sufficiency of the charge, as well as to avoid a subsequent conviction for the same offense, it is highly essential that whatever circumstances or facts are necessary to constitute the offense imputed must be averred positively and unequivocally. Such has always been the law with respect to indictments generally. *1 Chitty, Crim. Law, 231; Starkie, Crim. Pl. 73; Bishop, Crim. Proc. (4th ed.) Sec. 554, (citing several cases.)*

"A crime must be expressed positively and not with a 'that whereas' *or by way of recital.* Matter of inducement may be stated by way of recital, but the charge must be alleged in express and positive language. *1 Chitty, Crim. Law,*

231. The certainty required in an indictment, in addition to a definition of the crime, is a clear and positive statement of the offense. *A charge cannot be preferred by way of recital.* A material fact stated only by way of recital is fatal on motion to quash. *Dillon vs. State, supra.*

"Again, referring to the same subject, we said in the case of Terre Haute Brewing Co., vs. State, supra, that, '*the facts constituting an offense must be affirmatively averred, and not introduced by way of recital.*'

"It was held in McLoughlin vs. State (1873), 45 Ind. 338, that *even the legislature cannot dispense with the necessity of setting out the facts constituting a crime.* . . . . .

"In the light of the foregoing principles, we direct attention to the averments of fact contained in the first count of the indictment. It contains no allegation whatever that appellant, at the time of the alleged conversion, was an officer, agent, or employee of the loan association.

"*The clause 'being then and there an officer, agent and employee'* of the building and loan association *is but a recital, and is not equivalent to a direct and positive averment of the fact. The participial phrase merely states a condition, and not a fact, and at best leaves in the mind of the court an element of doubt,* whether the relationship recited as existing between appellant and the prosecuting witness was such as to make appellant's access to and possession of the money within the scope of duties he was employed to

perform, or whether such official agency or employment merely afforded appellant an opportunity to take it, as might reasonably arise were he but a director, a clerk, or janitor of the association.

"If the charge had been in substance that appellant was then and there an officer, agent and employee of said association, and by virtue of his said office and employment he then and there had access to, control and possession of $700 in money, to the possession of which money said association was then and there entitled, and said appellant while then and there in said office and employment, and in possession and control of said money by virtue thereof, did then and there feloniously, etc., our question would have been of a very different character. . . . .

"It will be noted that the (other) allegation is that appellant had possession by virtue of his being an officer, agent and employee. Can any court determine from this averment, with reasonable certainty, whether the pleader meant to charge, merely, that by virtue and because of his being an officer, etc., the way to the money was open to him? Or that the duties of the apellant's position embraced the access and possession? Or, in other words, can a court determine from the averments whether the crime imputed is embezzlement or larceny within the rule prescribed in Vinnedge vs. State, supra? *The expression employed is an apt illustration of the vice of pleading by recital and indirection in cases like this.*

"The first count of the indictment is clearly insufficient. Like infirmities exist in each of the other three counts, and for like reasons each is bad."

(7) *The charge that the money was abstracted and converted "to his, the said Thomas R. Sheridan's own use, benefit and advantage, AND to the use, benefit and advantage of one B. C. Agee," is ambiguous, uncertain, and unintelligible, because it does not allege what part, if any, of the money was converted to the defendant's use, and what part, if any, to the use of Agee.*

This objection carries its own argument. The defendant has a right to be advised, by indictment, of the contention of the government.

(8) The indictment is bad because it charges two separate and distinct offenses in each of counts Nos. 1 and 4.

Each of those counts charges that the defendant did "willfully and unlawfully abstract and convert *AND cause to be abstracted and converted*," the money described. The first offense charged is unlawful abstraction and conversion; *the second offense is willful misapplication*, that is, "did cause to be abstracted and converted." The defendant is entitled to know whether he is charged with having personally abstracted and converted the money, or whether he is charged with having induced or "caused" some other person to abstract and convert the money,

which latter offense is peculiarly the one intended to be denounced by Congress by the use of the term willful misapplication."

Furthermore, even assuming for purposes of argument, that two distinct offenses may be joined in one count of an indictment, each offense would have to be fully set forth; but the offense of willful misapplication is not fully described in this indictment because it does not *particularly* allege the means by which the willful misapplication was made, which means have been repeatedly held by the United States Supreme Court to be an essential element of that offense, (*Evans vs. United States, 153 U. S. 584*).

(9) The phrase in the indictment "with the intent to injure and defraud the said national banking association *AND* said depositor and creditor therein" is ambiguous, unintelligible and uncertain, and repugnant to the other material allegations of the indictment.

From the description of the ownership of the property charged to have been abstracted, it is clear that if there were an intent to defraud it must necessarily have been an intent to defraud the depositor whose property is alleged to have been abstracted. Or if the property be regarded as property of the bank, if there were an intent to defraud it must have been an intent to defraud the bank. There could not have been, under any construction, an intent to defraud both the bank and the depositor.

(10) If the property described in the first and fourth counts of the indictment be regarded as the property of the depositors named therein, then the indictment is defective, because it does not allege that the property was abstracted "without the knowledge and consent of *said depositors*."

The indictment merely alleges that the abstraction was made "without the knowledge and consent of said national banking association."

It is elementary that to constitute an "unlawful taking" it must be proved as an essential element that the defendant took the property out of the possession of the owner without his consent, and that fact must be charged in the indictment.

(11) The indictment does not describe any property which is of such a nature that it can be "unlawfully abstracted and converted," within Section 5209, R. S.

(a) If the money was the property of the depositor, then the abstraction of it was not within the prohibition of Section 5209, R. S. (See Pont No. 1, supra.)

(b) If the money was the property of the bank, then there is no description whatever of the money charged to have been abstracted, the only property described being a mere debt—a chose in action —of the bank to the depositor, which is incapable of "abstraction."

(12) The indictment charges, not "unlawful abstraction and conversion," but that money was obtained by the defendant under false pretenses, which is not an offense against the United States.

(a) The indictment charges that the abstraction was "by means of a certain instrument designated as a memorandum check." When a check or order is presented to a bank for payment, the bank gives the title and possession of the amount of money named in it to the person presenting it. Therefore the person presenting the check does not "abstract" or "take" the money. It is voluntarily given to him. The defendant, therefore is charged, not with "abstracting," but with using means to induce the bank to "give" the money to him. Consequently, the charge that the money was obtained *by means of a "memorandum check"* shows conclusively that it was not "abstracted."

(b) The indictment charges that the money was abstracted "with intent to defraud." In fraud a person is induced to voluntarily part with the title and possession of his property; the property is not "abstracted" from him. Therefore, since, according to the indictment, the defendant intended, not to "abstract" the money, but to induce the owner to voluntarily give it to him, the defendant did not have the intent necessary to constitute an "abstraction."

(13) The indictment does not charge that the bank or the depositor has suffered any injury, be-

cause it does not charge that the memorandum check was not as valuable as the money charged to have been abstracted by means of it. If the memorandum check was not drawn on the account of the depositor named in the indictment, it was a negotiable instrument which might be of as great value as the money abstracted by means of it. Therefore the indictment is bad because it does not charge that the check was of no value or not of equal value.

There can be no crime unless an injury has been suffered, and therefore an indictment should charge positively and clearly the facts showing the injury.

ARGUMENT

The Evidence Does Not Support, and is at Variance With the Charges in the First and Fourth Counts of the Indictment.

I. The evidence shows that the relation of the bank to the depositors was that of debtor and creditors, and that the bank did not hold any money "for the sole use and benefit" of any depositor.

The Court below charged the jury as follows:

> "But if you are satisfied beyond a reasonable doubt that he (the defendant) had no authority from the depositor to withdraw the funds, and if you further find that he had no

reasonable cause to believe and did not in good faith believe that he had such authority, then his abstraction of the funds was wrongful, and the crime is complete if you find that the abstraction was made with the intent to injure or defraud either the banking association or the depositor. (Tr., p. 234). . . . .

"It is presumed that every person intends the natural and ordinary consequences of his own acts. Applying this rule to the case at bar, if you should find from the evidence beyond a reasonable doubt that the defendant without authority took from the accounts of his depositors named in the indictment, without previous authorization from them, *their* money and converted the same to his own use and benefit, and thereby placed the same beyond the control of said depositors, you would be justified then in presuming that he did these acts with intent to injure and defraud said depositors." (Tr., p. 237.)

The defendant requested the Court to charge the jury as follows:

"I also particularly except to the Court's refusal to instruct the jury in accordance with defendant's requested instruction No. 5, that an officer of a National Bank who has full charge of making loans on behalf of the bank, has a right to lend any portion or all of the money deposited in the bank by depositors on general checking accounts without first obtaining permission from the depositor or depositors to do so." (Tr., p. 243; also see Assignment of Error No. XXVIII., Tr., p. 267.)

In *Marine Bank vs. Fulton, 2 Wall. 252, 256,* Mr. Justice Miller, delivering the opinion of the United States Supreme Court, said:

> "All deposits made with bankers may be divided into two classes, namely, those in which the bank becomes bailee of the depositor, the title to the thing deposited remaining with the latter; and that other kind of deposit of money *peculiar to banking business*, in which the depositor, for his own convenience, parts with the title to his money, and loans it to the banker; and the latter, in consideration of the loan of the money and the right to use it *for his own profit*, agrees to refund the same amount, or any part thereof, on demand. . . . . It would be a waste of argument to prove that this was a debtor and creditor relation."

See also:

First Nat. Bank vs. Lanier, 11 Wall. 369, 375;

Thompson vs. Riggs, 5 Wall. 663, 678;

Burton vs. U. S., 196 U. S. 283;

Bellew vs. U. S., 160 U. S. 187;

Leather Mfgrs. Nat. Bk. v. Merchants Nat. Bank, 128 U. S. 26, 34;

Planter's Bank vs. Union Bank, 16 Wall. 483;

Manhattan Co. vs. Black, 148 U. S. 412;

County Bank vs. Massey, 192 U. S. 138, 145.

In *United States vs. Youtsey, 91 Fed. 864,* Circuit Judge Taft, in charging the jury, said:

"You are all doubtless sufficiently familiar with the business of banking to know that it consists chiefly of receiving money on deposit, subject to check, and of lending out at interest, not only the money paid in as capital by its stockholders, *but also a large part of the amounts received from its depositors, retaining on hand enough to meet the checks which the depositors are likely to present in the ordinary course of business.* The amount required to be retained on hand for this purpose by national banks is called a 'reserve.' . . . . Another rule laid down in the banking act is that the total indebtedness of any person or firm to national banks shall not exceed one-tenth of the capital stock of the bank. . . . As already stated, violations of these rules are not punished as crimes, but it is left to the Comptroller to enforce them by an exercise of the supervisory power entrusted to him by law."

In *Michie on Banks and Banking, Vol. 2, p. 883, Sec. 119,* it is said:

"Ordinarily the relation between a bank and its depositor is that of debtor and creditor, and not that of agent and principal, bailor and bailee, or trustee and cestui que trust, unless the moneys deposited are public funds or funds held by the depositor in a fiduciary capacity, knowingly accepted by the bank. This is equally true of private banks, deposits in savings banks, and deposits arising from collections made for a correspondent bank." (Citing a great number of cases.)

"Where a party confides a sum of money to another, who is to return to him, upon demand, a like sum, and not the identical money, the transaction is a simple deposit. If any other terms or conditions enter into the contract, it does not assume the character of a deposit. If the sum cannot be withdrawn, at the pleasure of the creditor, but is to remain for a certain period in the hands of the debtor, it becomes a gratuitous loan. If it is to be repaid with interest it becomes a loan upon interest." (p. 887.)

In *Burton vs. United States, 196 U. S. 283, 297,* the Court said:

"The defendant had an account with the bank, took each check when it arrived, went to the bank, indorsed the check, which was payable to his order, and the bank took the check, placed the amount thereof to the credit of the defendant's account, and nothing further was said in regard to the matter. In other words, it was the ordinary case of the transfer or sale of the check by the defendant and the purchase of it by the bank, and upon its delivery to the bank, under the circumstances stated, the title to the check passed to the bank for it became the owner thereof. It was in no sense the agent of the defendant for the purpose of collecting the amount of the check from the trust company upon which it was drawn. From the time of the delivery of the check by the defendant to the bank it became the owner of the check; it could have torn it up or thrown it into the fire or made any other use or disposition of it which it chose, and no right

of defendant would have been infringed. The testimony of Mr. Brice, the cashier of the Riggs National Bank, as to the custom of the bank when a check was paid, of charging it up against the depositor's account, did not in the least vary the legal effect of the transaction; it was simply a method pursued by the bank of exacting payment from the indorser of the check, and nothing more."

The evidence shows very clearly that the United States Attorney and all the depositors who testified on behalf of the Government, as well as the Court itself, made the grievous mistake *of assuming that the general checking accounts of the depositors consisted of specific moneys "held by said National Banking Association as a deposit for the sole use and benefit of one David Hull,* (and the other depositors mentioned), a depositor and creditor of said The First National Bank of Roseburg," (Indictment, Tr., p. 7,) —instead of mere debts—chosen in action—of the bank to the depositors—and consequently that the bank or its agents would have to obtain specific authority from the depositors in order to lend the money deposited by them to third persons and thus have the money earn interest for the benefit of the bank. As virtually the only profit or income which men who organize and conduct a national bank derive from the bank is the interest which it receives for itself on loans which it has made of money that has been deposited with it, without first asking permission of the depositors or making them parties to the

loans, it is almost inconceivable that such a mistake could have been made. It is elementary that when a person deposits money with a national bank on a general checking account he *by that act gives the bank the full legal title to the money and full authority to lend the money which he has deposited to whomsoever it pleases*, or invest it in any manner it pleases for its own benefit. The depositor in such a case looks solely to the credit of the bank for the payment of its debt to him on demand, that is, upon his drawing a check or order on it. If the depositor wishes to obtain interest on the amount of money he has deposited, he must have his general checking account—that is, his loan to the bank payable on demand—cancelled, and a "time" deposit created or a so-called certificate of deposit issued in his favor—that is, make his loan to the bank payable only at the expiration of a specified period.

Viewing the rights of the depositors in this case as, not rights to specific moneys which they have deposited in the bank, but as mere choses in action against the bank, which is the demonstrably correct view, the facts shown by the evidence divide themselves into two groups, neither of which is in any way connected with or related to the other, and neither one nor both of the groups states or constitutes the offense against the United States charged in the indictment, or any offense against the United States.

The first group of facts is as follows:

(1) The president of a national bank attempted to change a debt of the bank from a debt payable on demand into a debt payable at the expiration of a specified period; that is, he attempted to change a depositor's general checking account into a "time" deposit. The only acts constituting the attempt were:

(a) The making of an entry on the books of the bank that the debt due from the bank to the creditor was not payable on demand. Debts of the bank payable on demand are entered in the books of the bank as general checking accounts. Therefore, in order to cancel the creditor's general checking account, a memorandum check or charge slip was drawn against the account.

(b) The making of an entry on the books of the bank that the debt due from the bank to the creditor was payable at the expiration of a specified period. Debts of the bank payable at the expiration of a specified period were usually required to carry interest in favor of the creditor, and were ordinarily evidenced by a certificate of deposit or other form of promissory note signed by the bank and payable to the creditor or depositor. Therefore a promissory note was executed by the president in favor of the depositor.

The creditor did not consent to the change, and therefore the attempt to change the time of payment of the debt was ineffectual.

(As the defendant was the managing agent of the bank, his personal note—that is, signed with his initials—was the note of the bank, and that he himself, as well as the depositors, so regarded it, is shown by the fact that, as testified by the depositors, he executed his personal notes in those instances where it clearly appears from the circumstances that he could not possibly have been personally interested, and in which the bank unquestionably received all the interest not paid to the depositors.)

The second group of facts is as follows:

(2) A national bank through its board of directors appointed its president as its managing agent. The president was entrusted with possession of the money of the bank for the purpose of lending it, at the president's discretion, to third persons, and he was also given possession of the bank building in which the money was situated. The president, through servants appointed by him, kept a book in the bank building in which he kept a record of his transactions with third persons on behalf of the bank, and also of the current financial transactions between himself and the bank, there being a daily interchange of debits and credits on the books between himself and the bank. The president entered a credit of a certain amount in his own favor in that part of the book in which a record was kept of the transactions between himself and the bank. He also entered a credit of a certain amount in favor of a third per-

son in whose business he was interested. No money or other property was removed from the bank building either by himself or anyone because of such credit entry having been made, or at all, nor were any checks drawn against such credit entries, nor had the bank become obligated in any way or to any extent as a result of such credit entries having been made.

Regarding the first group of facts above-mentioned: It should be borne in mind that the evidence shows clearly that when the depositors asked the bank to pay them interest on the amounts of their deposits, its president told them that it would if they would change their deposits—their call loans to the bank—into time loans, the bank would pay them a part of the interest received by it from lending their money. In other words, rather than have the depositors withdraw the money from the bank so that the bank would not receive any interest on it, the bank would give the depositors a part of the interest if they would permit it to remain in the bank. *Exactly the same transaction occurs several times daily in every National Bank in the United States in issuing the ordinary "certificate of deposit."* A depositor in any National Bank who does not intend to check out before some distant day the amount of money that he has deposited, ordinarily calls at the bank and has issued to him a "certificate of deposit"—which is, in effect, a promissory note of the bank payable at a certain rate of interest in thirty

days or at some other definite time—which prevents the depositor from withdrawing the amount of money he has deposited with the bank before the date fixed. In other words, in consideration of the relinquishment by the depositor of his right to withdraw at any time the amount of money that he has deposited, and his promise to not withdraw it before a distant future day, the bank agrees to pay to the depositor a part of the interest which it receives from lending his money, because under those circumstances it will not be required to retain cash in the bank as a reserve to cover the possibility of an immediate withdrawal by the depositor of his money without prior notice to the bank.

The only differences between the "certificates of deposit" issued by all national banks in our large cities and the promissory notes executed by defendant to the depositors who testified in this case, and placed under the proper index file in the vault of the bank are:

1. (a) Because of the vast number of loans made by the national banks in the large cities, a certificate of deposit issued by them is for an arbitrarily fixed period—such as thirty days—and its period does not correspond with the period of the loan which is made to a third person of the amount of money thus lent to the bank for a definite period by the person to whom the certificate of deposit is issued;

(b) Because of the comparatively small number of loans made by the bank of which the defendant was president, it was very easy to make the promissory note of the bank to the depositor payable at the same time that the loan made by the bank to the third person would mature, and thus the bank would be enabled, if the depositor should wish to then withdraw the amount of money due him, to pay the depositor the money which it would have just received from the third person, without in any way affecting the cash reserve in the bank; and

2. (a) The "certificates of deposit" issued by the large national banks are delivered by the bank to the person in whose favor they have been issued;

(b) Because of the intimate personal relations between the defendant and the depositors who have testified in this case, and his unquestioned financial standing and personal character, together with the fact that the number of loans made by the bank was comparatively small, the defendant's promissory notes on behalf of the bank to the depositors were not requested by the depositors to be delivered to them, but were put in the securities file of the bank under the proper index letter for the depositor's name.

The defendant was clearly acting for the best interests of the bank, and was exercising good banking policy, in converting the account of Mrs. Verrell from a demand deposit into a time deposit and thus

enabling her to receive interest on the amount of money deposited, because she had intimated to the defendant that she might withdraw the money from the bank for the purpose of making an investment, and if that were done the bank would lose the privilege of using her money. By changing the form of her account and paying her interest the defendant caused any pecuniary motive she would have in seeking an early investment outside the bank to cease to exist.

II.

The evidence demonstrates that no money was ever abstracted "by means of a certain instrument designated as a memorandum check."

There is no evidence whatever that when the memorandum checks were received by the bank, or at the time when the memorandum checks were charged against the depositors' accounts, or at any time, any moneys, funds or credits were taken or abstracted or removed from the bank in any way by means of such memorandum checks.

The evidence shows conclusively that (Tr., p. 66) on March 4, 1911, a deposit slip—not a memorandum check—was filed by means of which a credit of $230 was given to B. C. Agee, and that (Tr., p. 66) on March *7th, three days afterwards*, the memorandum check was received by the bank and charged against the depositor's account. Therefore the credit

could not possibly have been caused or obtained by means of the memorandum check.

III.

The evidence does not show the *corpus delicto*, that is, that any moneys, funds or credits have been abstracted or converted.

The situation shown by the evidence is as follows (assuming for purposes of argument that the defendant was not the managing agent of the bank) :

A certain person keeps a book in which he has entered the names of his creditors and the amount due each of them. Another person, without the knowledge of the owner of the book, causes one of the latter's servants to increase the amount shown by the book to be due a certain creditor. Nothing further is done. *Quaere:* Has any money or other property been "taken" or "abstracted" from the owner of the book?

(a) The evidence regarding the first count of the indictment is that the defendant by means of *a deposit slip* caused a credit of a certain amount to be entered in one of the books of the bank to the credit of B. C. Agee.

The evidence regarding the fourth count is that a credit was entered in defendant's account. It is not shown that the defendant entered the credit or caused it to be entered. The evidence is merely that it "was" entered.

There is no evidence that any check was ever drawn against either of those credits, or that any money, fund or credit was ever abstracted or obtained in any way by defendant or Agee or anyone else because of or through such credit or credits having been given. *There is no evidence that* any money, fund or credit has ever left the possession or control of the bank, either because of such credits or otherwise. *There is no evidence that* at any time the bank has been "short" in its moneys, funds or credits on hand, or that it has become obligated in any way because of those credits.

In United States vs. Martindale, 146 Fed. 280, 285, the Court said:

> "This count (the fourth) charges misapplication of the funds of the bank, growing out of a draft drawn by the Excelsior Water Mill Company for $5,000 on the defendant, in favor of the Burlington National Bank, with the allegation that said draft was paid out of the moneys, funds and credits of said Emporia Bank to the Burlington Bank by the defendant and said Davis by making and causing to be made a deposit slip in the words and figures as follows: 'First National Bank of Emporia, Kansas. Deposited for account of Burlington Nat. 7-17-97. $5,000. W. Martindale,' who made and caused to be made by one ————, whose name is to the grand jury unknown, a clerk in said bank, in a book used by said association, and designated as the cashbook, a certain

entry to the credit of the Burlington National Bank: 'July 17, 1897. Burlington Nat. Martindale, $5,000.' That afterwards said Burlington National Bank drew from the funds of said First National Bank the sum of $5,000, so placed to its credit as aforesaid; the defendant and said Davis knowing that said Excelsior Water Mill Company and the defendant had no moneys, funds or credits in said First National Bank to pay said draft, and that said association received no consideration for the same, and that the same was without its knowledge and consent, the defendant and said Davis then and there fraudulently devising that the said Burlington National Bank, the Excelsior Water Mill Company, and the defendant should obtain possession of said $5,000 for the use and benefit of said Excelsior Water Mill Company and the defendant.

"This count is subject to the objection designated respecting the first count, that the transaction is not alleged to have been without the knowledge or approval of the board of directors or governing committee.

"It is furthermore apparent from a careful reading of this count that it proceeds upon the theory that the misapplication was in entering a credit to the Burlington National Bank of the sum of $5,000, the same as if it had been deposited by the defendant in cash. *The entry was not a misapplication of the funds, but the wrong would consist in withdrawing the money from the bank.* The only allegation of the in-

dictment in this respect is, 'that afterwards said Burlington National Bank drew from the funds of said First National Bank the sum of $5,000 so placed to its credit. There is no allegation as to when this was done, or that there was any wrong or fraud in withdrawing the money; nor is there any negation that any additional consideration may have been given by the Burlington Bank at that time. Neither is there any allegation of any loss of this money to the bank. The only statement is that at some time after July 17, 1897, the Burlington Bank drew the sum of $5,000. Whether or not this was ever lost or paid, or sufficient security therefor given, is nowhere alleged. As shown in the previous discussion, *it is essential to show a loss.* As said in Britton's case, supra, the discount may have turned out to be a benefit to the association, for there is no averment that the note was not paid at maturity, or that the association suffered any loss by reason of this discount. As heretofore stated, as held in the Dow case, *a mere entry in the books of the association did not constitute a misapplication, but as the crime was committed and consummated only when the money was drawn from the bank, it must follow that the indictments must show that the money got out of the bank in some way.* . . . . . This count (the seventh) charges a misapplication in that there was deposited to the defendant's credit on April 1, 1898, the sum of $5,000. It is quite evident from reading the specifications of this count that *it was in the mind of the pleader only to charge the completion of the misapplication by the fact of entry in the books of the bank, and*

not in the withdrawing of the funds. There is no showing when or under what circumstances the money was drawn from the bank, nor is there any loss directly alleged to have occurred. The count is also subject to the objection discussed in respect of the first count of the indictment for a failure to allege that the transaction was without the knowledge or approval of the board of directors or discount committee. . . . .

"The count (the eighth) proceeds evidently upon the theory that the misapplication consists in the entry in the account, and not in drawing out the money of the bank. Neither does it show how, when, nor the circumstances under which the money was drawn from the bank, nor does it appear that the money was lost to the bank."

In *Dow vs. United States, 82 Fed. 904, 906, (C. C. A.—8th Ct.)*, the Court said:

"The jury were instructed that the fact that Miller received credit in his account on the books of the bank for checks drawn on that bank or on other banks constituted a flagrant misapplication of the funds of the Commercial National Bank, within the meaning of Section 5209; yet it is apparent that merely giving credit to Miller on the books of the bank for the amount of the checks did not lessen the funds held by the bank, nor in fact defraud the association in any form. To complete a misapplication of the funds of the bank, it was necessary that some portion thereof should be withdrawn from the possession or control of the bank, or a conversion in

some form should be made thereof, so that the bank would be deprived of the benefit thereof. It is not necessary in all cases that the money should be actually withdrawn from the bank. Thus, if by connivance between a bank official and a customer of the bank, the latter is allowed to draw checks on the bank, when the drawer has not the funds to meet the checks, and the same are given by the drawer to third parties in payment of claims to them, the third parties instead of getting the cash on the checks, have them credited up to their accounts in the bank, this completes the misapplication of the funds of the bank, because the bank has become bound for the payment of the sums thus credited to the third parties; and the result is just the same as though the holders of the checks had obtained the money thereon, and had subsequently deposited it to their credit. In such cases the funds of the bank would be lessened and thereby the criminal misapplication might be completed. *If, however, the customer presents the checks himself and has the same credited on his account the crime of misapplication is not completed thereby, because the bank is not under legal obligation to pay out any of the amounts wrongfully credited to the customer, and may refuse to pay checks drawn against the inflated account, and may at any time charge back against the customer the amounts of checks.* . . . To complete the criminal misapplication of the bank funds in the supposed case, *some sum must be paid by the bank to the customer, or to third parties on his order, or must be credited to third parties under such circumstances that the bank*

becomes bound for the payment thereof. If the jury had been instructed that, if the evidence showed that Dow, as president of the bank, had knowingly permitted Miller's account with the bank to be inflated by crediting him with large amounts of false or fictitious checks, or checks drawn by parties who had no funds in the bank against which to draw, and Dow had furnished Miller with certified checks on the Commercial Bank, or had otherwise permitted him to draw large sums from the bank, so that in fact the funds of the bank had been depleted or withdrawn, and this was done under circumstances showing an intent on the part of Dow to defraud the bank by thus allowing its funds to be depleted, a case of misapplication of the funds, within the meaning of the statute had been made out, no just exception could have been taken thereto. The positive instruction, however, that merely crediting up on Miller's account the checks in question amounted to a misapplication of the funds of the bank within the meaning of the statute, was clearly contrary to the construction placed on the statute by the Supreme Court, and we are compelled therefore to sustain the exceptions taken to the several parts of the charge, wherein it was stated that the reception and crediting of the checks on Miller's account constituted a violation of the statute; and as these parts of the charge were directed to the very gravamen of the counts charging a misapplication of the funds, the error therein was material and necessitates the granting of a new trial in the case."

In *Mohrenstecher vs. Westervelt, 87 Fed. 157 (C. C. A.—8th Ct.)*, the Court said:

> "To constitute a misappropriation there would have to be a conversion of the funds of the bank in some form to the use of the cashier, or some person other than the bank, with the intent to injure and defraud the bank. . . . . The burden was upon the plaintiff to show that Mohrenstecher by means of these notes wrongfully obtained money from the bank. *If by executing the notes and delivering them to the bank, he was either paid or took money from the bank, that fact was capable of proof by showing the reduced amount of the cash on the day it was taken.*"

In *Agnew vs. United States, 165 U. S. 36*, it was said:

> "A charge that if the defendant either embezzled or willfully misapplied the funds or credits of the bank, 'whereby as a necessary, natural or legitimate consequence *its capital was reduced or placed beyond the control of the directors, or its ability to meet its engagements or obligations or to continue its business was lessened or destroyed*, the intent to injure or defraud the bank may be presumed,' is correct."

III. (b) The evidence merely shows that "by means of a certain instrument designated as a memorandum check" the defendant made an ineffectual attempt to change debts of the bank from debts payable on demand to debts payable at the end of a speci-

fied period. No property was abstracted from the bank or from the depositors or from anyone because of such attempt.

III. (c) There has been no "conversion" because neither the bank nor the depositors can sue the defendant or Agee for conversion.

As stated by Judge Hough in *United States vs. Heinze, 183 Fed. 907*, an indictment for a violation of Section 5209, R. S.:

> "Could the bank have maintained an action for conversion against the respondent of the discount proceeds under the facts stated? I think not, and am therefore of opinion that counts fourteen and fifteen are demurrable."

In *United States vs. Morse, 161 Fed. 429, 435*, an indictment for the willful misapplication of funds of a national bank, the Court said:

> "Conversion is a technical term, and it is a fair question: Could the bank have maintained an action sounding in tort against Morse for this $126,000, directly it was paid out, assuming ability to prove the above-recited allegations? I think it could, and, if so, the conversion is sufficiently alleged."

The bank could not have maintained an action of conversion in this case because no property had been taken from it, nor had it become obligated to any extent.

Even assuming, for purposes of argument, that the accounts of the depositors in this case were special deposits of particular moneys held by the bank for their sole use and benefit, the depositors could not have maintained an action for conversion because there is no evidence that any of that money was taken or "abstracted" either from them or from the bank. In other words, the evidence does not show that there has been a violation of any right of either the bank or any of the depositors or anyone, or that the defendant has done any act or acts from which anyone has suffered any injury. *If the accounts were general checking accounts, then, so far as the depositors are concerned, all the defendant has done has been to attempt to change a debt due each depositor from a debt payable on demand to a debt payable at the end of a specified period, which attempt was clearly ineffectual to any extent.*

It is elementary that in every case, civil and criminal, the cause of action depends upon the violation of a right, and not on the motive or intent with which an act which does not violate a right is done. Clearly no right has been violated in this case. Considering the leading case which defined this principle, the Court, in *Quinn vs. Leathem, 1901, L. R., A. C., 495, 508*, said:

> "The headnote to Allen vs. Flood (1898), A. C. 1, might well have run in the words used by Baron Parke in giving the judgment of a specially strong Court nearly half a century ago

(Stevenson vs. Newnham—1853—13 C. B. 297): '*An act which does not amount to a legal injury cannot be actionable because it is done with a bad intent.*' That, in my opinion, is the sum and substance of Allen vs. Flood if you eliminate all matters of merely passing interest."

The board of directors of the bank could not have maintained an action for conversion against the defendant.

The president of a bank who has been entrusted by the board of directors with the management of the bank *has authority to do whatever the board of directors could have authorized him to do.*

In *Sun Printing, etc. Assn. vs. Moore, 183 U. S. 642, 651*, the Court said:

"As Lord (the Managing Editor) was charged with the full control of the business of collecting news and impliedly vested with power to enter into contracts with respect thereto, he was, in effect, a general officer of the corporation as to such matters, *and it is well settled that the president or other general officer of a corporation has power prima facie to do any act which the directors or trustees of the corporation could authorize or ratify. Oakes vs. Cattaraugus Water Co., 143 N. Y. 430*, and cases cited. The burden was on The Sun Association to establish that Lord did not possess the authority he assumed to exercise in executing the contracts. *Patterson vs. Robinson, 116 N. Y. 193, 200*, and cases cited. As the trustees of The Sun Associa-

tion were unrestricted by the charter, and might have authorized Lord to execute the writings in question, and the association failing to refute the *prima facie* presumption, he must be held to have been vested with such power."

IV.

There are no facts shown by the evidence from which an intent to defraud—the *mens rea*—on the part of the defendant may be inferred.

A fraudulent intent may be inferred from willfully and knowingly doing an unlawful act. But no unlawful act is shown by the evidence. To constitute an unlawful act from which an intent to defraud may be inferred, there must be an obtaining of something for nothing or for a consideration of less value. A lawful abstraction of moneys of the bank might be made by defendant without the depositor's consent if he were authorized by the bank to abstract it. But as defendant was the managing agent of the bank he was authorized by the bank to abstract its money.

The severity of the punishment imposed by Section 5209, R. S., negatives the idea that mere technical violations are to be punished. *Folsom vs. United States, 160 U. S. 122.*

In *Agnew vs. United States, 165 U. S. 36, 49,* the Court said:

> "The rule of law in regard to intent is that intent to defraud is to be inferred from willfully

and knowingly doing that which is *illegal, and which in its necessary consequences and results must injure another.*"

In *Hayes vs. United States, 169 Fed. 101 (C. C. A., 8th Ct.,)*, an indictment for violation of Section 5209, R. S., the Court said:

> "The testimony has all been very carefully examined, and we fail to find anything indicating that this was a sham transaction in any other sense than that it was an accommodation note. There is no substantial evidence tending to show that Farmer was insolvent or unable to respond to the demand of the bank for payment of the note at any time, or that there was any understanding between him and the officers of the bank that he should not be held on the note if they should be unable to protect him from liability by paying it or taking care of it themselves. . . . . While evidence, to convict of crime, may be circumstantial and inferential in its character, it must always rise to that degree of convincing power which satisfies the mind beyond a reasonable doubt of guilt."

In *Steinman vs. United States, 172 Fed. 913, (C. C. A., 3rd Ct., decided Oct. 6, 1909)*, Circuit Judge Buffington, delivering the unanimous opinion of the Court, said:

> "In the Court below E. H. Steinman was convicted on an indictment charging him, under Revised Statutes (U. S. Comp. Stats. 1901, p. 3497), with aiding and abetting Charles E.

Mullin, cashier of the Farmers and Merchants National Bank of Mount Pleasant, Pa., to willfully abstract the funds of said bank. On the imposition of sentence Steinman sued out this writ of error.

"The abstractions charged in the indictment consisted of overdrafts, previously sanctioned by the president and cashier of the National Bank, but not by its board of directors, of the Acme Lumber and Supply Company, of which the defendant was an officer, and the president and cashier of the bank were stockholders. In its charge to the jury the District Court said: 'An arrangement by which the cashier and the president of a banking institution allow the funds to be taken out is not a justification, either on the part of the president and cashier or on the part of a person dealing with the president and cashier. The funds of national banking institutions can only be taken out by the action of the board of directors. . . .

"An overdraft of an account is not *per se* and necessarily an abstraction of the bank's funds under Section 5209 by the drawer of a check who has not funds to meet it. Nor is the payment of such overdraft check by an executive officer of the bank, without action by the board, necessarily a misapplication under such section. Indeed in Bolles on Modern Banking, p. 199, it is said: 'Generally, two kinds of overdrafts are as clearly justified as any other kind of a loan: (1) an unintentional overdraft by a depositor in good standing, and possessing ample means

to pay; (2) an overdraft to be paid in pursuance of a prior agreement, resting on abundant credit.' It will thus be clearly seen that the facts and circumstances attendant upon an overdraft may affect the character of the overdraft and determine whether it is criminal and within the purview of Section 5209, which as we have seen concerns transactions where one 'embezzles, abstracts or willfully misapplies.' This is clearly shown in the cases involving that section before the Supreme Court. There the distinction is clearly drawn between acts of willful misapplication under Section 5209, and those of maladministration in violation of Section 5200 (p. 3494). For example, that 'the total liabilities of any association to any person . . . . for money borrowed . . . . . shall at no time exceed one-tenth part of the capital stock of the association actually paid in, and which acts of maladministration shall, under Section 5239, (p. 3515), subject the bank to forfeiture of its charter. Thus in *United States vs. Britton, 107 U. S. 655*, the Court says: 'We are therefore of opinion that the willful misapplication of the moneys and funds of the banking association, which is made an offense by Section 5209, means something different from the acts of official maladministration referred to in Section 5239, and it must be a willful misapplication for the use or benefit of the party charged, or of some person or company other than the association, with intent to injure and defraud the association, or some other body corporate, or some natural person.'

"And in *United States vs. Northway, 120 U. S. 327*, it is said: 'In the case of the *United States vs. Britton, 107 U. S. 655, 669*, the offense of willfully misapplying the funds of a banking association, as defined by the statute, was considered with reference to the facts in that case. It was there held that a willful and criminal misapplication of the funds, as defined by Section 5209, did not include every case of an unlawful application of funds, inasmuch as in the very statute itself there were other instances of unlawful misapplication, evidently not embraced within the intention of Section 5209. For that reason it was held, in that case, that it was necessary to specify the particulars of the application, so as to distinguish that charged in the indictment as willful and criminal from those others contemplated by the statute which were unlawful, but not criminal.'

"Now this distinction between an unlawful act of maladministration, which, of course, misapplied the funds of the bank and subjected the bank to forfeiture of its charter, but which is not punishable under Section 5209 as a willful misapplication, the Court in its charge failed to draw, but, on the contrary, instructed the jury that such an unlawful act of maladministration evidenced an intent which warranted conviction. The language was: *'If by the paying of these checks, or any of them, either the moneys of the bank were removed from the resources of the bank, or its capital reduced, or its charter endangered,* any one of these things would be sufficient to warrant you in finding that the mis-

application was with intent to injure the banking institution.'

"Under the facts there was really nothing left for the jury to pass on. Taking these overdrafts under the arrangement alleged, they were loans of more than one-tenth of the capital of the bank. *In paying the checks the moneys of the bank were removed from its resources*, and that they as excessive loans endangered the charter of the bank were all matters which *could not be gainsaid*, and *from them the jury were in effect directed to infer the intent necessary to a conviction under this indictment.*

"Such instruction, being at variance with the views expressed by the Supreme Court, we are of opinion that in this regard, as well as in ruling out the testimony mentioned, the defendant has just ground to complain, and *the judgment imposed must be reversed.*"

In *Prettyman vs. United States, 180 Fed. 30, 34,* (C. C. A., 6th Ct., 1910), the Court said:

"The conduct of Lettich, the cashier, in recklessly paying overdrafts, and that of Prettyman, the vice president, in insisting upon their accepting excessive accommodations for the Woolen Company, of which he was the chief executive officer, were most reprehensible and altogether lacking in faithfulness to the trust reposed in them by the stockholders of the bank, and merits the severest condemnation. And this is so whether or not all of that conduct shall turn out to include all of the elements of criminality

> prescribed by the statute under which they were indicted. *But gross maladministration and inexcusable breach of duty on the part of its officers in the management of a national bank, however disastrous such conduct may be to its stockholders, are not punishable unless they come within the provisions of Section 5209, Revised Statutes.* The Supreme Court in *United States vs. Brewer, 139 U. S., at page 288*, althought alluding to another enactment, announced the applicable principle when it said that: 'Before a man can be punished his case must be plainly and unquestionably within the statute.' "

"The question of fraud or no fraud is one necessarily compounded of fact and of law; and without a clear and precise knowledge of the facts from which the legal conclusion should be deduced, it is not easy to perceive how any legal conclusion can be reached." *Ogilvie vs. Knox Ins. Co., 18 How. 577, 581; Wasatch Mining Co. vs. Crescent Mining Co., 148 U. S. 293, 298; McLoughlin vs. Bank, 7 How. 221, 228.*

If any offense is established (and we contend none is) it is not "abstraction," but one of the following four:

VI.

(1) *If any offense is shown by evidence, it is embezzlement and not "unlawful abstraction."*

The evidence shows that the defendant, as managing agent of the bank and as an agent with power

to lend, had possession of the money charged to have been abstracted.

To constitute an unlawful abstraction or taking there must be at the moment of taking possession the intent to appropriate the property or to defraud the owner or any other person. But since at the time the defendant is alleged to have taken possession of the property charged to have been abstracted by him no such intention existed, but if formed at all was formed afterwards while the goods were in his lawful possession, an "unlawful abstraction" could not possibly have occurred. The offense in such case would be embezzlement. Evidence of embezzlement is insufficient to show the "unlawful taking" which is an element in larceny.

Section 5209, R. S., creates and prohibits the commission of three new offenses, unknown to the common law: (1) Embezzlement; (2) Unlawful abstraction; and (3) Willful misapplication—of moneys of a national bank by one of its officers with intent to defraud. Such acts before the statute and at common law were mere breaches of trust. The statute in effect provides that when officers of national banks shall be charged with embezzlement or larceny the *animus furandi*, or intent to convert and keep the property permanently, need not be proven, if a mere intent to defraud is shown. In other words, the statute merely modifies the extent or character of the wrongful intent required to be shown when officers of national banks are charged with embezzle-

ment or larceny, but it does not modify or change any of the other essential elements necessary to constitute embezzlement or larceny. Therefore, since the "unlawful taking," which is of the essence of larceny, has not been shown in this case, there can be no larceny or "unlawful abstraction."

The cashier of the bank testified that the defendant had full and exclusive power of lending the money of the bank, and that "Tom Sheridan and I ran this bank," the cashier's part in "running the bank" consisting of merely clerical duties. (Tr., p. 63). Therefore defendant as President had possession of the money at the time he is charged to have "unlawfully abstracted" it.

Abstraction is conversion to his own use by an officer of a national bank when the funds are not especially entrusted to his care. Dow vs. United States, 82 Fed. 904; United States vs. Youtsey, 91 Fed. 864.

Quaere: Who had possession of the moneys in the general fund of this bank? Inasmuch as the corporation could act or have possession of its property only through its agents, which of its agents had possession of its moneys? Certainly not the board of directors, because it had turned over to the defendant the possession of all the property of the bank with *discretionary* power of lending or otherwise disposing of its funds. Certainly not the clerks in the bank who were inferior to the defendant, because they

merely had the manual custody of the money. The defendant, being the president and actual manager of the business of the bank and of its property is the only person who can be said to have had possession of the moneys of the bank. Therefore if he converted the money he would be guilty only of embezzlement, and not of unlawful abstraction. The ownership of the moneys was in the corporation, but the possession, which is a physical fact exercisable only by a natural person, was in the defendant.

In Vol. 1, *Clark and Skyles on The Law of Agency*, Section 5, page 8, in discussing the distinction between an agent and a servant, it is said:

> "The distinction which has generally been made is that the function of an agent is to enter into contract relations with third persons for and on behalf of his principal, and, usually, in that connection, to determine the mode of effecting the desired purpose without being under the direct control of the principal. That is, an agent does some act, in a manner suggested more or less by his discretion or judgment, *which has the effect to establish a contractual relation between his principal and a third person.* On the other hand, servants are persons who are employed by and are subject to the direction and control of the master, usually for a definite period and at fixed wages or salary, and whose duties require them to perform some service which does not result in a contract between the master and another."

In *Huffcutt on Agency, Sec. 4*, it is said:

> "The fundamental distinction between an agent and a servant lies in the nature of the act which each is authorized to perform. An agent represents the principal in the performance of an act resulting in a contractual obligation, or an obligation springing from contract relations. A servant represents the master in the performance of an act not resulting in a contractual obligation."

In *United States vs. Youtsey, 91 Fed. 864, 867*, the Court said:

> "Embezzlement is the unlawful conversion by an officer of the bank to his own use of funds entrusted to him, with intent to injure or defraud the bank. Abstraction and misapplication are a conversion to his own use by an officer of the bank of funds of the bank which are not especially entrusted to his care."

In *United States vs. Cadwallader, 59 Fed. 677*, the Court said:

"Upon a careful consideration of the statute (Section 5209, R. S.) I am satisfied that it creates and defines several *distinct* offenses, *probably not less than nine.* It is true the punishment for each offense is the same, but that circumstance is not controlling in determining whether or not the offenses are one and the same, or distinct and several. If the evidence to establish one is of necessity entirely dif-

ferent from that which would be sufficient to establish another—if the indictment and prosecution and defense would be wholly different—then the offenses are not the same, but are distinct; and that this should be so seems quite clear. *The proof to establish a case of willful misapplication of funds, or an abstraction of the moneys or funds of the bank, would be inadequate to make a case of embezzlement.*"

There would be a true case of "unlawful abstraction" if a clerk of a bank should enter the bank after business hours at night and abstract or take money from the bank's vault.

VII.

(2) *Or if any offense is shown by the evidence, it is "maladministration," and not "unlawful abstraction."*

The defendant was vested with the exclusive duty of lending the money of the bank, and in pursuance of that duty he necessarily had to *lawfully* "abstract" the money of the bank. If afterwards he lent it improperly he would be guilty only of maladministration, which is not an offense against the United States for which he would be personally punishable.

In *United States vs. Britton, 108 U. S. 193, 196,* the Court said:

> "The gravamen of the charge (under Section 5209, R. S.) is that defendant, being presi-

dent and a director of the association, and being insolvent, procured to be discounted his own note, the same not being well secured, the payee and indorser thereof being also insolvent, which he, the defendant, well knew. The incriminating facts are that the note was not well secured, and that both the maker and indorser were, to the knowledge of the defendant, insolvent when the note was discounted. The question is therefore presented, whether the procuring of the discount of such a note by an officer of the association is a willful misapplication of its moneys within the meaning of the law. We are clearly of opinion that it is not. It is not even necessarily a fraud on the association.

"One branch of the business of a banking association is the discounting and negotiating of promissory notes, and this is to be done by its board of directors or duly authorized officers or agents. Section 5136, Revised Statutes. There is no provision of the statute which forbids the discounting of a note not well secured, or both the maker and indorser of which are insolvent. It is within the discretion of the directors or the officers or agents lawfully appointed by them to discount such a note if they see fit, and it might, under some circumstances, tend to the advantage of the association. This count does not charge that the note of the defendant was discounted at his instance, without the authority of the board of directors. On the contrary, the charge is that he caused and procured it to be discounted. This implies that it was done by the directors or other duly authorized officers or

agents. It is not alleged that the discount was procured by any fraudulent means. From all that appears the board of directors or the officer or agent by whom the note was discounted may, upon knowledge of all the facts in the utmost good faith and for the advantage of the association, have desired to discount the note. The discount may have turned out to be a benefit to the association, and there is no averment that the note was not paid at maturity or that the association suffered any loss by reason of its discount.

"But whether the discounting of the note was an advantage to the association or not, and whether the note was paid or not, is immaterial. *If an officer of a banking association, being insolvent, submits his own note with an insolvent endorser as security to the board of directors for discount, and they, knowing the facts, order it to be discounted, it would approach the verge of absurdity to say that the use by the officer of the proceeds of the discount for his own purposes, would be a willful misapplication of the funds of the bank, and subject him to a criminal prosecution.* The count under consideration charges nothing more than this against the defendant. We are of opinion therefore that it does not charge an offense under Section 5209, of the Revised Statutes."

In *United States vs. Britton, 108 U. S. 193, 197,* the Court said:

"In respect to the third count . . . . . the count charges neither application or misappli-

cation by the defendant of the funds of the association. It merely charges that he failed to apply certain funds standing to the credit of Alfred M. Britton to the payment of Britton's debt. It charges that he permitted Alfred M. Britton to do a perfectly lawful act, namely, to withdraw his own funds from the association and transfer them to another bank.

"This might be an act of maladministration on the part of the defendant. It might show neglect of official duty, indifference to the interests of the association, or breach of trust, and subject the defendant to the severest censure and to removal from office; but to call it a criminal misapplication by him of the moneys and funds of the association, would be to stretch the words of this highly penal statute beyond all reasonable limits. . . . .

"In our judgment, the count under consideration, as well as the first and second, is bad."

In *United States vs. Britton, 108 U. S. 199, 206,* the Court said:

"The indictment having charged a conspiracy between the defendants to misapply the moneys of the association, proceeds to aver by what means the misapplication was to be effected, namely, by procuring to be declared by the association a dividend when there were no net profits to pay it. If procuring the declaring of such a dividend by the association is not a willful misapplication of its funds by these defendants, then the indictment charges no offense.

The declaring of a dividend by the association when there were no net profits to pay it is, in our judgment, not a criminal misapplication of its funds. It is an act done by an officer of the association in his official and not in his individual capacity. It is, therefore, an act of maladministration and nothing more, which, while it may subject the association to a forfeiture of its charter, and the directors to a personal liability for damages suffered in consequence thereof by the association or its shareholders, does not render them liable to a criminal prosecution. The act belongs to the same class as the pledge by a banking association of its own shares when not necessary to prevent a loss on a debt due it, which, in *United States vs. Britton, 107 U. S. 655*, we held not to be a criminal misapplication of the funds of the association. If, therefore, the indictment had charged that the defendants had misapplied the funds of the association by themselves declaring a dividend, when there were no net profits to pay it, if would not have charged a criminal act, much less when it merely charges that they conspired to procure the association to declare a dividend under like circumstances. So that it appears on the face of the indictment that the conspiracy charged was not a conspiracy to commit an offense against the United States.

"Our opinion is that under this indictment the defendants are not 'liable to the penalties provided by Section 5209, upon proof that they, as such directors, willfully voted for the declaration of a dividend, knowing there were no net

profits out of which to pay the same,' because this is not the offense with which they are charged in the indictment. And as they are charged with a conspiracy to do an act which is not an offense, we are of opinion that no penalties could be inflicted on them under the indictment."

In *Adler vs. United States, 182 Fed. 464, 469,* the Court said:

"The evidence indisputably shows that by the transaction charged the Schwartz Foundry Company obtained no money, and that the bank lost none, and that there was no misapplication of the funds of the bank. It is difficult to believe that the statute intended to condemn as criminal, transactions by which the bank lost nothing, and could not, in the nature of things, have been subjected to any loss, and by which defendant gained nothing for himself or for others."

In *United States vs. Britton, 107 U. S. 655, 666*:

"We think the willful misapplication made an offense by this statute (Section 5209, R. S.) means a misapplication for the use, benefit, or gain of the party charged, or of some company or person other than the association. Therefore to constitute the offense of willful misapplication there must be a conversion to his own use or the use of some one else of the moneys and funds of the association by the party charged. This essential element of the offense is not averred in the counts under consideration, but is negatived by the averment that the shares purchased by the defendant were held by him

in trust for the use of the association, and there is no averment of a conversion by the defendant to his own use or the use of any other person of the funds used in the purchase of the shares. The counts, therefore, charge *maladministration* of the affairs of the bank rather than criminal misapplication of its funds. If we hold these notes to be good, then every official act of any officer, clerk or agent of a banking association, by which its funds are applied in a way not authorized by law would be punishable under Section 5209. . . .

"To bring the case under Section 5209 there must be averments to show that the application was not merely a use of the money for the benefit of the association forbidden by law, but a criminal misapplication by which it was possible that the association could be defrauded."

VIII.

(3) *Or if any offense is shown by the evidence, it is "making a false entry," and not "unlawful abstraction."*

Changing a credit in a depositor's account on the books of the bank from one payable on demand to one payable at the end of a specified period, or filing a deposit slip which causes a depositor's account on those books to be given a credit to which he is not entitled, nothing being shown to have been abstracted from the bank because of such credit having been given, is, if any offense under Section 5209, R. S., the "making of a false entry."

IX.

(4) *If any offense is shown by the evidence, it is "obtaining money under false pretenses," and not "unlawful abstraction."*

The evidence shows that the memorandum checks were presented to the bookkeeper of the bank. Therefore if any money was given to the defendant or anyone by the bookkeeper or the teller because of his having given the bookkeeper the memorandum check, the title to the money was voluntarily transferred to the defendant by another officer of the bank, and the defendant did not "abstract" or take it.

If money or goods are obtained by a fraudulent trick or pretense, but the owner, being deceived by the pretense, intends to part with his property in the money or goods, the offense is that of obtaining money by false pretenses, and not larceny or "unlawful taking." *R. vs. Adams, 1 Den. 38 (The leading English case); R. vs. Atkinson, 2 East P. C. 673;* which hold that this rule applies where goods are obtained by the forged or pretended order of a customer.

X.

The Court erred in admitting in evidence, over defendant's objection, testimony that the account of the person to whom the defendant had lent the money charged to have been abstracted was in overdraft at the time of such loan.

The defendant was not being tried for maladministration or for abusing the power which had been given to him by the board of directors to lend the money. He was charged with having abstracted moneys of certain depositors from the bank by means of a memorandum check. Therefore the admission of testimony that the account of the person to whom the defendant lent the money was in overdraft at the time of such loan was the admission of evidence tending to show a distinct offense in no way connected with or related to the charge on which defendant was being tried, and was highly prejudicial and injurious to defendant because such testimony *was considered by the jury under the Court's ruling as evidence tending to show that the defendant was guilty of the offense actually charged against him.*

XI.

The evidence shows that if any abstraction was made it was made "with the knowledge and consent of said national banking association," that is, with the knowledge and consent of its managing agent who had full charge of its business.

As managing agent the defendant had possession and the right of disposal of the property of the bank. If an abstraction was made by him, he, as such managing agent, knew that the abstraction was made, and it is elementary that the knowledge and consent of a managing agent is the knowledge and consent of the principal.

XII.

The Court erred in refusing to give defendant's requested instruction No. 12.

(Assignment of Error No. XXXV, Tr., p 270; also Tr., p. 228.)

That requested instruction was that the jury be instructed that if the defendant had authority from the depositor to withdraw the amount of the depositor's account from the bank and apply it to a certain purpose, and did withdraw the amount, but applied it to a different purpose, he would not be guilty of "unlawful abstraction of moneys of the bank." It was obviously correct and should have been given.

XII A.

The defendant erred in admitting in evidence to show intent to defraud the so-called "similar offenses" or transactions.

(1) The admission by the court of this evidence prejudiced and injured the defendant because the instructions given by the Court, based on it, led the jury to believe that these "similar offenses" were unlawful (whereas, as a matter of fact, they were unquestionably lawful), and therefore that the defendant had been engaged in a course of criminal conduct.

(2) Furthermore, under the theory adopted by the Government in the lower court that the de-

fendant had used funds specially held by the bank for a given depositor, without authority, nevertheless the admission of the proof relating to other alleged offenses was highly prejudicial and was erroneous.

Taking the objections in the order named:

(1) Throughout this argument it is the contention of the plaintiff error that the defendant being the authorized president of the corporation, had the right to loan the bank's funds. The Government entirely failed to prove any special deposit giving ownership to the depositor in any of the funds entrusted by him to the bank. Therefore the funds were the property of the bank and not of the depositors, and the president had an absolute right to loan them under the authority he held from the bank. The bank as a debtor owed money to the creditor but the president could abstract no funds belonging to a depositor because the funds were the property of the bank.

Had the Government intended to proceed on any other theory it should have indicted for abstracting the funds of the bank and not the funds of a depositor. Having elected to stand upon a certain theory it is bound by the allegations of its indictment. Its proof must conform to its allegations. Its proof is of a state of facts obviously at variance with the allegations of the indictment. Under the authorities heretofore cited in this brief, everything done by the plaintiff in error was lawful. By admitting in evi-

dence proofs of any similar acts committed by the defendant in the court below the jury were unquestionably given the distinct impression that the defendant had been guilty of an extended course of unlawful dealing. By permitting the Government to introduce evidence relating to a long series of acts, under the instructions of the court, the jury could not have received any other impression than one distinctly unfavorable to the defendant.

(2) We are utterly unable to believe that this court can hold that any offense was committed by the defendant under the allegations of the indictment and none under the proofs adduced. However, as the Government proceeded on the theory that the defendant had abstracted funds without the authority of the depositors, to whom the Government contended the funds belonged, the United States Attorney introduced evidence of numerous actions on the part of defendant in loaning funds under similar warrants of authority from depositors.

The authority upon which such evidence was introduced, as explained by the instructions of the Court, was to establish intent on the part of the defendant.

Evidence of "similar offenses" is always extremely injurious to a defendant because by cumulative effect it leaves before the jury a mass of proof any single element of which may establish nothing from a criminal standpoint, but the whole mass of

which leaves, in the confused mind of the juror, an indistinct but overwhelming impression of guilt of some kind or other. The fact that the Court admits evidence of these so-called "offenses" of itself convinces the jury that the act of the defendant was a crime—otherwise the Court would not admit proof of it.

In the present case—laying aside for the moment the contention that the act of the defendant was guiltless under the statute—and assuming that the act of the defendant charged in the indictment was a crime, proof of these "similar offenses" was highly prejudicial. There was no attempt by the defendant to dispute the fact that certain funds had been loaned and the defense was that the depositor had consented. This was admitted by the depositors in every case, although there was some qualification as to the extent of the authority.

Under the theory adopted by the Government on the trial, the only difference could be as to the authority given by the depositor to the defendant. The president claimed he had authority and the depositor either admitted such authority or disputed the extent of it. Assuming that the Government's contention was right and that the defendant committed the act, the intent flowed from the act, if done without authority. The admission of testimony of other appropriations of money could only have the effect of tending to sustain the contention of the prosecution that the money was taken without authority, that

being the only issue disputed in the court below. Each case, however, depended upon its own peculiar facts, and the result of the admissions of proof of other "offenses" was to array against the defendant a number of claimants, many of whom were wrong in their contentions, and found by the jury to be wrong. The admission of such proof under the circumstances was clearly error and was most highly prejudicial.

The law relating to proof of "similar offenses" has engaged the attention of a great number of judges and courts. Nowhere has the subject received better attention than in the case of *State v. Bokien, 44 Pac. 889*, where the defendant was charged with having obtained money by means of a worthless check. There the Supreme Court of Washington says:

> "Upon the trial the court permitted the state to introduce in evidence, over the objection of the defendant, several checks drawn by defendant prior to the date of the one in question, and to prove that they had been presented to the bank by the various persons to whom they were given, and were not paid because the defendant had no funds on deposit, and that defendant knew that payment thereof had been refused. It seems that this evidence in reference to the drawing and delivery of other checks was admitted for the purpose of showing the condition of defendant's bank account, and, as a consequence, the intent with which he delivered the check to Sharick. There was no con-

nection whatever between the several transactions which were permitted to be shown and that for which the defendant was being tried, and the evidence objected to was, therefore, incompetent for any purpose. We are, of course, aware that there are exceptions to the general rule that it is not competent to show the commission of another distinct crime by the defendant for the purpose of proving that he is guilty of the crime charged, but we are of the opinion that the evidence here admitted does not come within any of the exceptions. *Commonwealth v. Jackson 132 Mass. 16; Barton v. State, 18 Ohio, 221; 3 Rice Ev. pp. 208-11.* The evidence was not competent to prove the intent of the defendant in the particular transaction mentioned in the information, for the reason that it would not logically or legitimately follow that he intended to defraud Sharick because he had defrauded other parties at various times previously. It was not competent for the purpose of showing defendant's motive, for that, as well as his intent, would be inferred from his acts. The question of mistake was not involved in the case, and the previous transactions of the defendant which were permitted to be shown no more formed a part of a single scheme than the several larcenies of a thief *(State v. Kelley, 65 Vt. 531, 27 Atl. 203);* and it certainly would not be competent, in order to show that one had stolen certain property, to prove that he committed larceny at a previous time. The evidence as to these checks which were not mentioned in the information must have been greatly prejudicial to the defendant, for it, in effect com-

pelled him, without previous notice, to acquit himself of at least seven distinct offenses in addition to the one with which he was directly charged. Moreover, in this instance, the question of criminal intent or guilty knowledge was not in issue, for at the very threshold of the trial the defendant admitted that he signed the check in controversy; that he delivered it to Sharick, and got from him the pitcher; and that he then had no money in the bank to meet it; and at the same time he gave notice to the prosecution, through his counsel, that he expected to prove that he never made the pretenses and representations alleged in the information, but, on the contrary, expressly stated to the prosecuting witness, Sharick, when he delivered the check, that he then had no money in the bank, but would have soon, and that the check would then be paid; and he so testified in his own behalf, and his testimony was corroborated by other witnesses. There was, therefore, really but one question for the jury to determine, and that was whether the defendant did or did not make the statements imputed to him; and hence all of the evidence in regard to the giving of other checks was absolutely foreign to the case, and therefore, inadmissible upon any theory or rule of evidence."

In the case of *State v. Burlingame, 146 Mo. 207 (48 SW 72)*, the defendant, who was president of a bank, was indicted for having received a deposit, knowing the bank to be insolvent. Witnesses were permitted to testify to making similar deposits under

like circumstances. The court reversing the action of the trial tribunal says:

> "It is clear, we think, that each deposit, if received under circumstances prohibited by statute was a separate and distinct offense, and this being so, the evidence was inadmissible. It was not permissible for the purpose of showing guilty knowledge on the part of the defendant because different crimes, provided the bank was insolvent or in failing circumstances at the time and defendant knew it, and the evidence did not tend to show these facts, besides, the evidence was positive that the defendant received the deposit described in the indictment in person, and with respect thereto no additional proof of guilty knowledge was necessary."

For language equally strong see the decision in *Commonwealth v. Jackson, 132 Mass. 17 (44 Am. Rep. 299).*

We are aware of the fact that there are federal cases in which it has been held permissible to introduce evidence of "other offenses" to establish intent. Reference may be made to the case of *Brown v. United States, 142 Fed. 1,* and *Dorsey v. United States 101 Fed. 746,* where an officer of a bank was charged with unlawfully abstracting money *from his bank, by making loans to irresponsible institutions in which he had an interest.* In such cases the intent of the defendant in making the loan and taking the money of his bank becomes important. As an officer he had a right to make the loan, but if, by a consistent

course of misconduct, he appropriated the money of his banking institution and loaned it to irresponsible companies in which he had a private interest, and *for the purpose of private gain, it became material to show that he was not making these loans legitimately as an officer but with the criminal intent to enrich himself by fraudulent withdrawals of funds.* The distinction between the classes of cases is marked and apparent.

We believe that the language of Judge Sanborn, dissenting, in *Dorsey v. United States*, *Supra*, is distinctly applicable to the case at bar and of itself distinguishes the cases which have been relied on by the Government from that now before the Court. Judge Sanborn says:

> "In my opinion, there were three grave errors in the trial of this case, which entitle the plaintiff in error to another hearing:
>
> (1) "The government was permitted to introduce in evidence, over the objection of defendant, as a part of its case in chief, a report of the comptroller of the currency dated on May 17, 1892, which was not counted on in any of the indictments, 'for the purpose' as counsel for the government stated, 'of showing that certain items were falsely made in that report, of a similar kind to those charged in other reports, and for the purpose of showing the intent of defendant in making false entries in reports, aside from those on which he is specifically charged.'

That is to say, this report was offered in evidence for the purpose of showing an independent offense with which the plaintiff in error was not charged, and for the purpose of showing his intent to commit that offense, in the hope, doubtless, that the jury would infer from this that he intended to commit and did commit some of the offenses with which he was charged. This report seems to me to be irrelevant, because it is not mentioned in the indictments; because no charge of false entries in it had ever been made in any way before it was offered in evidence upon the government's case in chief; because no proof that any of the entries in it were in fact false had been produced when it was received in evidence; because it was not competent to try or convict the plaintiff in error of the offense of making false entries in this report, without indictment or notice, and it was not competent to convict him of any other offense by proof of this crime with which he had never been charged, of which he had received no notice, and against which he had no opportunity to prepare his defense."

XIII.

The Court abused its judicial discretion in refusing to direct the jury to return a verdict in favor of the defendant, and in denying defendant's motion for a new trial, since the verdict was contrary to the evidence, and the evidence was insufficient to justify the verdict.

The fact that the Court stated after the return

of the verdict, that it did not believe that the evidence showed an intent to defraud, taken in connection with the total absence of facts from which an intent to defraud could be inferred, shows that the Court abused its discretion in denying defendant's motion for a new trial.

It is well settled that it is the duty of the Court to withdraw a case from the jury when there is insufficient evidence in the case from which the jury can properly find in favor of the party upon whom rests the burden of proof.

Pleasants vs. Faust, 22 Wall. (U. S.) 116;

Schuylkill, etc. Co. vs. Munson, 14 Wall. (U. S.) 442;

Bell vs. Carter, 164 Fed. 417;

U. S. vs. R. R. Co., 189 Fed. 471;

Mining Co. vs. Mining Co., 203 Fed. (C. C. A.) 795.

XIV.

If a violation of Section 5209, R. S., be a misdemeanor, the judgment and sentence that the defendant be imprisoned for five years are void.

It is a corollary of Section 335 of the Federal Penal Code of 1910 that: "*No misdemeanor shall be punished by imprisonment for a term exceeding one year.*"

Section 335 of the Penal Code (Act of Congress of March 4, 1909, ch. 321, 35 Stats. at L. 1080, 1152) provides that:

"All offenses which may be punished by death, or imprisonment for a term exceeding one year, shall be deemed felonies. All other offenses shall be deemed misdemeanors."

This objection is fully presented under Point 2 of this brief on consideration of demurrer to indictment.

XV.

Assuming the Government's theory under the indictment to be correct, and the indictment to state an offense against the United States, the evidence fails to sustain the verdict but is directly opposed to the verdict.

So great is our confidence in the contention that the indictment does not state an offense against the United States and that the Government's case proceeded on an absolutely erroneous theory that there had been an abstraction of funds owned by the depositor, it is with reluctance that we review the evidence at all. Nevertheless, assuming even the Government's theory to be correct the evidence is insufficient to warrant a conviction and this court should reverse the judgment of the court below.

The defendant in the court below, after the overruling of the demurrer to the indictment, could do nothing but meet the Government on its own contention. The Government contended that the defendant had used the funds of the various depositors named in the indictment which were then on deposit with the bank, of which Sheridan was president. The defend-

ant introduced evidence to show that he had authority from the depositors to make these loans.

Eight separate counts were lodged against the defendant; on six he was acquitted; on two convicted. The first upon which conviction was obtained related to the deposit of David Hull (count one). Mr. Hull testified on his direct examination as follows: (Tr. 44).

> "I had a conversation with Mr. Sheridan, relative to the loaning of some of my money, in March, 1906. I told Mr. Sheridan, one day I met him, I had some money. I said 'Mr. Sheridan, how about loaning out some money to a good man?' 'Am I a good man?' I said, 'Yes sir, you are, Mr. Sheridan.' I never gave him any other authorization except that."

On cross examination the witness Hull testified as follows:

> "I had been in the bank and I said, 'How about loaning about $500 of my money to a good man,' and Mr. Sheridan said, "Ain't I a good man?' And I said, 'Yes Sir.' I have no idea when that was. I don't know how much I did have in the bank at that time. I knew then that he took $500. I didn't know exactly at what time, for he didn't say, but I expected him to. I don't know what year this was in. I suppose he took $500. *I told him to take it.* I never got no note. I suppose the note is in the bank." (Tr. 44.)

The witness then produced his bank book showing a debit of $512.50 and promissory note for $512.-

50. He admitted receiving $460.00 on an $800.00 note to John Sheridan, signed by Tom Sheridan, $400.00 being principal and $160.00 interest. (Tr. 44-5.)

The witness likewise admitted having signed a statement to the National Bank Examiner that he had authorized Mr. Sheridan to draw these funds and invest them for him. (Tr. 47.) *The witness says that he thoroughly understood what was meant by signing this instrument to the National Bank Examiner and that it was read all over to him and he reaffirmed its correctness at the trial. (Tr. 48.)* This letter to the National Bank Examiner, with the release clause, is Defendant's Exhibit No. 1.

Relating to the David Hull account the defendant's testimony does not differ materially from that of the witness and is found Tr. p. 212. He states the authority given him by the witness Hull.

The other count (count four), upon which the defendant was convicted, related to the matter of Laura M. Verrell.

This witness testified to being a depositor in the bank and that her conversation with the defendant was as follows:

> "He asked me if I wanted to loan that money that was paid in on the mortgage; he said he would get a good loan for me and I supposed it was to be the bank would loan the money. There was nothing said about it, that the bank was to loan that money, but he asked, not in-

dividually, but as President of the bank, a representative of the bank; I supposed that the bank was the one that was loaning."

Court. "Just state what was said."

Witness continuing. "Mr. Sheridan wanted to know if I wanted to loan it, and I said I didn't know, I was intending to put it into real estate, and he said I would better loan it, it would bring me more, and I didn't want to give him any answer at that time, I wanted to think it over, which I did, and he wanted to know at that time if I wanted to put any more with that $4,000 and I told him I didn't know, that I would think it over, which I did, and I told him that I would put some more that time but there was nothing said of how much to put with it, how much I would put with it, because at that time I expected to see him again before this loan was made. That is all the conversation we had until he handed me the memorandum check; there was nothing said as to when the money was to be drawn from the bank or how. When he handed me the memorandum check, I never saw a memorandum check before and I supposed that was to show the bank had loaned my money. He said my money was safe—safely invested, and I told him at that time I didn't know as I ought to spare that much, and he said I could have it at any time by giving a short notice, so I let it go at that, and I supposed my money was loaned by the bank." (Tr. 74-5-6.)

The witness testified that the memorandum check was handed to her by Mr. Sheridan in the Bank.

(Tr. 78.) *The witness then admits having signed a letter to the National Bank Examiner, Mr. Goodheart, in which she acknowledged that she had given authority to Mr. Sheridan, the defendant, to use the money.* The witness endeavored to state that the letter was misrepresented but acknowledged that no explanation was made concerning it to her. This letter was received through the mails, read over by the witness and mailed by her. *(Tr. 81)* and is found on *Tr. p. 82.*

This witness was intelligent, tried repeatedly to draw distinctions between Mr. Sheridan in his private capacity and in his capacity as representative of the bank. (Tr. 74.) The witness acknowledged receipt of letters from Mr. Sheridan relating to her interest on the money loaned, etc. *(Tr. 85.)*

Under this state of the record the court below was asked to give to the jury the following instruction:

> "If you find that the defendant had exclusive power to make loans for the bank, then the defendant was not required to obtain the consent of a depositor having a checking account to the withdrawal, for the purpose of making loans on behalf of the bank, of the moneys deposited by the depositor." (Tr. 270.)

The case below was tried by the District Attorney on the theory that he had to bear the burden of proving the money to be taken without authority. On page 77 of the transcript the U. S. Attorney said:

> "Now, as I understand, it is going to be incumbent upon me to establish that this money was taken in the manner and approximately the time named in the indictment, *and that it was taken without authority of these people.*"

While we think that we have made our contentions clear that this theory is wholly at variance with the law, and that the loaning of the money was lawful by the president in handling the funds of his own bank, yet, meeting the contention of the Government the evidence we have above referrd to (which is practically all the evidence of consequence relating to these two counts), the defendant was entitled to an acquittal and is now entitled to a reversal.

The defendant appears from the testimony to have been a kindly, respectable and well meaning man, trusted by his neighbors and friends. He was approached by these depositors whom he had known for many, many years, who wanted their money loaned. Believing that it was their money they authorized the loan; the authority was undisputed. The money was loaned and checks and promissory notes received and interest paid and received and acknowledged by the depositors. Thereafter in the settlement of the affairs of the bank, which were to be taken over by another institution, the National Bank Examiner addressed a letter to each of these depositors detailing the fact that Mr. Sheridan had informed him that these moneys were loaned by their direct authority and asking them, if true, to confirm

this. *They did confirm it in writing, and the writing appears in the record and in the exhibit.*

It is one of the failings of human nature that when money is lost the loser wishes to blame somebody. Even people of normal mental balance seem then disposed to repudiate everything they have said and done. One of these witnesses attempts to quibble over the signing of this authority, but her explanation is a mere excuse. The record stands practically without dispute that Mr. Sheridan, if he were loaning a depositor's money, had ample authority from the depositors; that such authority was repeatedly ratified and acknowledged; no complaint was made until long after when it appeared that in the general affairs of the bank there was a money loss.

Under the evidence the defendant was entitled to an acquittal, and while we are profoundly convinced that he committed no offense under the U. S. Statutes, yet adopting the theory of the Government's case, he committed not even a moral offense and the judgment on the verdict should be reversed.

Defendant respectfully submits that because of the errors committed in the court below, and hereinbefore particularly set forth, he has suffered grievous injustice and the judgment and sentence imposed upon him by the Court below should be reversed.

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